Staff Summary Report

Tempe

Council Meeting Date: 06/23/04 **Agenda Item Number:** 10

SUBJECT: RESOLUTION No. 2004.66 REAUTHORIZING THE CITY OF TEMPE MARKETPLACE DEVELOPMENT PARCEL AGREEMENT NO. 1.

DOCUMENT NAME: 20040623casv03 **RIO SALADO MASTER PLAN (0112-07-03)** Resolution No. 2004.66

SUPPORTING DOCS: Yes.

COMMENTS: Request approval of Resolution No. 2004.66 reauthorizing the execution of the Marketplace Development Parcel Agreement No.1 to clarify certain provisions in the Agreement relating to the Government Property Lease Excise Tax and Sales Tax provisions.

PREPARED BY: Neil Calfee, Redevelopment Manager (350-2912)
Marlene A. Pontrelli, City Attorney (350-8120)

REVIEWED BY: Melanie Hobden, Development Services Manager (350-8069)

LEGAL REVIEW BY: Marlene A. Pontrelli, City Attorney (350-8120)

FISCAL NOTE: All incentive tools included in this Agreement are performance-based (i.e. the project must be built and generate the incentive). This Agreement is structured such that the City retains 30% of the sales taxes generated by the project with the balance used to pay the extraordinary up-front project costs for environmental clean-up and geotechnical remediation.

RECOMMENDATION: Approval of Resolution 2004.66.

ADDITIONAL INFO: This Agreement has been changed from the initial agreement approved on May 6, 2004 in order to clarify that the 0.1% of sales tax restricted to the arts is not included in any rebate amount, and that the 0.5% of sales tax restricted to transit is provided for public transit improvements, and to clarify the basis for the granting of the Government Property Lease Excise Tax.

RESOLUTION NO. 2004.66

RESOLUTION OF THE CITY COUNCIL OF THE CITY OF TEMPE REAUTHORIZING THE MAYOR TO EXECUTE CITY OF TEMPE MARKETPLACE DEVELOPMENT PARCEL AGREEMENT NO. 1 WITH MIRAVISTA/VESTAR TM-LANDCO, LLC.

WHEREAS, on September 13, 2001 the Tempe City Council approved Resolution 2001.44 creating the McClintock/Rio Salado Parkway Redevelopment Area and pursuant to Resolution No. 2002.51 dated January 9, 2002, the City amended the University Hayden Butte Redevelopment Area to include the McClintock/ Rio Salado Parkway Redevelopment Area as "Area 5" of the University Hayden Butte Redevelopment Area; and

WHEREAS, the Mayor and Council of the City of Tempe approved the selection of Miravista Holdings LLC (the "Master Developer") as prime developers for University/Hayden Butte Redevelopment Area 5; and

WHEREAS, on November 12, 2002 a redevelopment plan was recommended for approval by the City's Planning and Zoning Commission and was approved by the Tempe City Council on January 9, 2003 to provide a guideline for redevelopment and other activities in the Redevelopment Area; and.

WHEREAS, the City and Master Developer entered into that certain Redevelopment Agreement (the "Master Redevelopment Agreement") ("MRA") entered into by the parties on September 25, 2003 and that was authorized by Resolution 2003.64 as adopted by the City Council on September 11, 2003; and

WHEREAS, this Agreement constitutes a partial implementation of the MRA as a Development Parcel Agreement as provided in the MRA, and approval hereof by the City is an administrative act of the City Council; and

WHEREAS, this Agreement is subject to cancellation by the Master Developer within ninety (90) days of its execution; and

WHEREAS, the development and redevelopment of the University/Hayden Butte Area 5, referred to as Marketplace, (the "Project") will result in improvements to, and new uses of, portions of the Redevelopment Area and will benefit the City and the public in general. This Agreement is consistent with, and will further the redevelopment goals of, the Slum Clearance and Redevelopment Act of the State of Arizona, A.R.S. §§36-1471, et. seq. and the Redevelopment Plan; and

WHEREAS, the City and Miravista/Vestar TM-Landco, LLC understand and acknowledge that this Agreement is also authorized by and entered into in accordance with the

terms of A.R.S. §9-500.11. The actions taken by the City pursuant to this Agreement are for economic development purposes as that term is used in A.R.S. §9-500.11, will assist in the creation and retention of jobs, and will in numerous other ways improve and enhance the economic welfare of the residents of the City; and

WHEREAS, the City of Tempe desires to obtain those public benefits that will accrue from the development of this Project.

NOW, THEREFORE, BE IT RESOLVED BY THE MAYOR AND COUNCIL OF THE CITY OF TEMPE, ARIZONA, AS FOLLOWS:

That the Mayor is authorized to execute the City of Tempe Marketplace Development Parcel Agreement No. 1 and all documents related thereto, copies of which are on file with the City Clerk's office.

PASSED AND ADOPTED by the Mayor and Council of the City of Tempe, Arizona, on _____, 2004.

_____
MAYOR

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

WHEN RECORDED RETURN TO:

City of Tempe
31 East 5th Street
Tempe, Arizona 85281
Attn: City Clerk

CITY OF TEMPE
MARKETPLACE
DEVELOPMENT PARCEL AGREEMENT
PARCEL NO. 1
(Loop 101 and Loop 202)

THIS DEVELOPMENT PARCEL AGREEMENT (this "**Agreement**") is entered into this ____ day of _____, 2004, by and between the CITY OF TEMPE, an Arizona municipal corporation (the "**City**"), and Miravista/Vestar TM-Landco, L.L.C., a Delaware limited liability company (the "**Builder**").

RECITALS

A. WHEREAS, pursuant to Resolution No. 2001.44 dated September 13, 2001, the City created the McClintock-Rio Salado Parkway Redevelopment Area (the "**Redevelopment Area**"), and pursuant to Resolution No. 2002.51 dated January 9, 2003, the City amended the University Hayden Butte Redevelopment Area (the "**UHB Redevelopment Area**") to include the Redevelopment Area as "Area 5" of the UHB Redevelopment Area.

B. WHEREAS, a redevelopment plan (the "**Redevelopment Plan**") was approved by the City, by Resolution No. 2002.51 dated January 9, 2003 to provide a guideline for redevelopment and other activities in the Redevelopment Area.

C. WHEREAS, pursuant to a Request for Proposals ("**RFP**"), dated December 13, 2001, for the master planning and redevelopment of the Redevelopment Area, the City selected Miravista Holdings, L.L.C. ("**Master Developer**") as the prime developer for the Redevelopment Area, subject to execution of a redevelopment agreement acceptable to the City and Master Developer.

D. WHEREAS, the City and Builder recognize that significant portions of the Redevelopment Area may be contaminated with hazardous substances and may not be developable without extensive and costly environmental remediation over the Property (as defined in paragraph G below) as a whole.

E. **WHEREAS**, the City and Builder believe that the development and redevelopment contemplated in and required by this Agreement will result in improvements to, and new uses of, portions of the Redevelopment Area, and will benefit the City and the public in general. This Agreement is consistent with, and will further the redevelopment goals of, the Slum Clearance and Redevelopment Act of the State of Arizona, A.R.S. §36-1471, et seq. and the Redevelopment Plan. Without limiting the foregoing, the City finds and determines that it will, directly or indirectly, realize substantial tangible and intangible benefits from Builder's performance of its obligations under this Agreement, including, but not limited to, the redevelopment of a key area within the City, increased tax revenues, increased opportunities for employment within the City, creation and retention of jobs in the City, increased tourism, expansion and improvement of available public parking facilities within the City in general and the Redevelopment Area in particular, and will otherwise improve or enhance the economic welfare of the inhabitants of the City.

F. **WHEREAS,** the City and the Master Developer entered into that certain Redevelopment Agreement (the "**Master Redevelopment Agreement**") ("**MRA**") entered into by the parties on September 25, 2003 and that was authorized by Resolution 2003.64 as adopted by the City Council on September 11, 2003.

G. **WHEREAS**, this Agreement pertains to a portion of the development rights of the Master Developer to specific property more particularly described in the attached **Exhibits B, C** and **D** (collectively the "**Property**"), and is subject to the responsibilities and obligations of the Builder, as defined in the MRA, to the extent, and only to the extent, set forth in this Agreement as to the Property.

H. **WHEREAS**, this Agreement constitutes a partial implementation of the MRA as a Development Parcel Agreement as provided in the MRA, and approval hereof by the City is an administrative act of the City Council.

I. **WHEREAS**, Master Developer has negotiated with Builder for a transfer of rights relating to the Property to Builder for purposes of assembling and remediating the Property and the construction of the Retail Project on the Property by Builder or related entities.

J. **WHEREAS**, the City is entering into this Agreement for the purpose of facilitating a retail project on the Property in order to generate the economic and other benefits to the City associated therewith, including the receipt by the City of sales tax revenues.

K. **WHEREAS,** the site of the Property is located within a single central business district. The improvements to be made to various portions of the Property will result in an increase in its value of at least one hundred percent (100%).

NOW THEREFORE, in consideration of the above premises, the promises contained in this Agreement and for good and valuable consideration, the receipt and sufficiency of which the parties acknowledge, the parties hereto agree as follows:

ARTICLE I

PURPOSE AND SCOPE OF AGREEMENT

This Agreement applies to that portion of the Redevelopment Area depicted on **Exhibit A** attached hereto and incorporated herein by reference, and constitutes a development agreement for the Property within the meaning of A.R.S. § 9-500.5 and shall be construed as such, and is in accordance with § 9-500.11. The Property collectively consists of certain parcels of real property owned by Builder on the date this Agreement is entered into and described on **Exhibit B** attached hereto and incorporated herein by reference (the "**Builder Property**"); those certain parcels of real property owned by third parties on the date this Agreement is entered into and described on **Exhibit C** attached hereto and incorporated herein by reference (the "**Private Property**"); and those rights-of-way, streets, alleys and other parcels appurtenant to the Builder Property and the Private Property owned by the City on the date this Agreement is entered into and described on **Exhibit D** attached hereto and incorporated herein by reference (the "**City Property**"). The parties intend, and the objective of this Agreement is to achieve, the redevelopment of the Property in furtherance of the goals of the Redevelopment Plan. This Agreement is consistent with, and will further the redevelopment goals of, the Slum Clearance and Redevelopment Act as found in A.R.S. §§ 36-1471, et seq. and the Redevelopment Plan for the Redevelopment Area as adopted by the City Council of January 9, 2003.

ARTICLE II

DEFINITIONS

The following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise.

2.1 "**Acquisition.**" The term "Acquisition" shall mean purchase of property by negotiation or final order of condemnation, or other control of property such that fee simple and insurable title can be conveyed to Builder.

2.2 "**Builder Property.**" The term "Builder Property" shall mean the parcels of real property owned by the Builder as described in **Exhibit B.**

2.3. "**Certificate of Completion.**" The term "Certificate of Completion" has the meaning set forth in **Section 6.7.**

2.4 "**City Property.**" The term "City Property" shall mean those rights-of-way, streets, alleys and other parcels appurtenant to the Builder Property and the Private Property owned by the City on the date this Agreement is entered into and described on **Exhibit D.**

2.5 "**Commencement of Construction.**" The term "Commencement of Construction" means the obtaining of a building, excavation, grading or similar permits by Builder for the construction of the subject Improvement.

2.6 "**Effective Date.**" The term "Effective Date" shall mean the date upon which this Agreement has been entered into by adoption and approval by the City Council.

2.7 "**Environmental Laws.**" The term "Environmental Laws" shall mean any federal, state or local statute, ordinance, or regulation pertaining to health, industrial hygiene, or the environment, including, without limitation, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §9601, et seq. ("CERCLA"); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. §6901, et seq. ("RCRA"); and the Arizona Environmental Quality Act, Title 49, Arizona Revised Statutes, and all rules adopted and guidelines promulgated pursuant to the foregoing.

2.8 "**Final PAD.**" The term "Final PAD" shall mean and refer to a Final Planned Area Development, which is approved by the City with respect to the development of the Property within the Redevelopment Area, which sets forth the specific uses, densities, features and other development matters with respect to the Property.

2.9 "**Preliminary PAD.**" The term "Preliminary PAD" shall mean and refer to that Preliminary Planned Area Development or Amended Preliminary Planned Area Development which is approved by the City with respect to the Property, and which sets forth specific uses, densities, features and other development matters with respect to the Property.

2.10 "**ID Agreement.**" The term "ID Agreement" shall mean and refer to a Development and Waiver Agreement outlining the specific terms and conditions of the Improvement District.

2.11 "**Improvements.**" The term "Improvements" means any and all improvements that may be constructed within the Property or the Redevelopment Area.

2.12 "**Improvement District.**" The term "Improvement District" shall mean and refer to the district created to finance the design and construction of the public road improvements, public utilities, storm water retention and other onsite and associated offsite public infrastructure development.

2.13 "**Parcel.**" The term "Parcel" means a specific portion of the Redevelopment Area, which may be all or a portion of the Property owned by Builder, City or other public and private third parties not part of this Agreement.

2.14 "**Private Property.**" The term "Private Property" means the parcels of real property owned by private owners or other non-City public agencies not party to this Agreement as described in **Exhibit C**.

2.15 "**Project.**" The term "Project" means the commercial project master-planned by the Master Development upon and within the Redevelopment Area, which includes Phase I as depicted on **Exhibit G of the MRA** as Phase I may be expanded by the Property. To the extent

that the Property exceeds the Phase I property described in the MRA, Phase I shall be deemed to include the excess Property.

2.16 "**Project Costs.**" The term "Project Costs" means reasonable costs expended by or on behalf of Builder in connection with acquiring the Property, remediating (or causing the environmental remediation of) the Property, master-planning, designing, and constructing the Retail Project, including, but not necessarily limited to, architectural, design, engineering and consultant fees; tests, studies and reports; remediation and geotechnical work; filing fees; plan check, inspection and other similar fees; all applicable City development fees; supervision and administration fees; costs of required payment, performance and other bonds; costs of insurance; and other customary "soft" costs and any "hard" costs and expenses incurred directly or indirectly by Builder in connection with the performance of its redevelopment and related obligations under this Agreement.

2.17 "**Retail Project.**" The term "Retail Project" means the retail project being built by Builder or its successors and assigns generally pursuant to the conceptual site plan set forth on **Exhibit G**, as modified, if at all, in the Final PAD.

2.18 "**Schedule of Performance.**" The term "Schedule of Performance" shall mean and refer to that schedule of performance agreed to by the City and the Builder as set forth in **Exhibit F** attached hereto and incorporated herein by this reference.

ARTICLE III

MASTER PLANNING

3.1 **Master Planning.** Concurrently with the remediation of the Redevelopment Area pursuant to **Section 3.5 of the MRA**, Master Developer and Builder have caused the Redevelopment Area to be master-planned within the City for a "mixed use" development. The Master Plan shall be subject to modification from time to time by Master Developer and Builder to address market demand, available financing and other similar factors, subject to City approval if required.

3.2 **Development Parcel Agreements.** The City and Master Developer in the MRA acknowledged that the development of the Redevelopment Area will be accomplished by Master Developer through a series of sales, leases, joint ventures and/or other agreements between Master Developer and other experienced developers as builders. No default by Master Developer under the MRA shall constitute a default under this Agreement unless such default is also a default by Builder under the terms of this Agreement.

3.3 **Acquisition of Private Property.** The Master Developer and Builder have invested significant time and funds in its efforts to acquire the Private Property. Builder shall continue to use commercially reasonable efforts to negotiate and enter into written purchase agreements with the then current owners of the Private Property in order to acquire such Parcels under terms and conditions acceptable to Builder, in its sole and absolute discretion. From time to time, upon request from the City, Builder will meet with the City to discuss Builder's progress

in acquiring such Parcels. In the event that the Builder is unable to purchase a Parcel of Private Property necessary for the redevelopment of the Property at a reasonable cost by direct negotiations with the owners of the Parcel, the City, subject to separate action by the City Council, may assist in acquiring the Parcel of Private Property by eminent domain proceedings.

3.4 Environmental Insurance. Prior to the City taking possession of any Parcel of Private Property or Builder commencing any environmental remediation activities, Builder shall purchase, at its sole cost and expense, a pollution legal liability and finite risk insurance policy or policies for the Property ("**Environmental Insurance**"), listing the City as an additional insured (the City acknowledging that such policy may also name other persons or entities as additional insureds) for policy provisions including cost-cap provisions for known and unknown pollutants, reopeners, third party liability claims for on-site bodily injury and property damage, third party liability claims for off-site clean-up resulting from pre-existing conditions, third party liability claims for off-site bodily injury and property damage, and liability claims arising out of transportation and disposal of pollutants. The Environmental Insurance term shall be for no less than ten (10) years. The City may approve any policy variations from the foregoing.

3.5 Taxes and Assessments. All taxes of any kind or nature levied, assessed or imposed upon this Agreement or any rights hereunder and all real estate taxes and assessments, if any, accruing on a Parcel from the date that possession of such Parcel is delivered to Builder free and clear of interests of third parties shall be borne and timely paid by Builder; provided, however, with regard to all Private Property the City acquires through the exercise of its eminent domain power, the City shall record each Order for Immediate Possession ("**OIP**") so as to ensure that real property taxes will not accrue during the period from the date on which each OIP is recorded through the date (after entry of a Final Order of Condemnation) on which title to each parcel is conveyed by the City to Builder. This provision does not apply to third parties and Builder shall have no obligation or liability for taxes and assessments which accrue during any period preceding Builder's possession of the Parcel as set forth above, which taxes and assessments shall be the responsibility of the former owner. Likewise, this provision does not preclude Builder from protesting the validity or amount of any tax or assessment levied and accruing against a Parcel after the date Builder acquires possession of such Parcel as set forth above.

3.6 Obligations Upon Acquiring Possession of the Property. After Builder acquires possession of all of the real property included in the Property, Builder will perform, at its sole cost and expense, and subject to all of the terms and conditions of this Agreement, the obligations set forth in this **Section 3.6**.

3.6.1 Environmental Remediation. Builder shall manage and carry out the investigation, characterization, and remediation of the Property within the Redevelopment Area required by, and in compliance with, the State of Arizona's Voluntary Remediation Program, as amended, A.R.S. Title 49, Chapter 1, Article 5 (the "**Remediation Program**"), and all other applicable Environmental Laws. This obligation shall be referred to as the Investigation, Characterization, and Remediation Commitment (the "**ICR Commitment**"). Builder shall perform such work with reasonable diligence and shall cause such work to be completed in accordance with a

schedule that is mutually satisfactory to the City, Builder, and the Arizona Department of Environmental Quality ("**ADEQ**"), with the goal of obtaining a "no further action" determination for soil remediation from ADEQ under A.R.S. § 49-181, a letter of completion under Arizona Administrative Code R18-7-208, or a similar determination that such remediation is complete, from ADEQ or other government agency with appropriate jurisdiction. To fulfill the ICR Commitment, Builder may select, design, and implement remedies so long as the remedies meet the requirements of the Remediation Program and all other applicable Environmental Laws.

3.6.2 Government Approvals. Builder shall be responsible for securing all governmental approvals required in connection with the work required under this **Section 3.6**.

3.6.3 Reporting. Builder shall provide the City on an ongoing basis with copies of all final test results or data and all final work plans, reports, and other documents obtained by Builder in the course of performing its obligations pursuant to this **Section 3.6**, whether or not submitted to ADEQ. Upon the City's written request, Builder shall furnish such information as the City reasonably requests concerning the status of the investigation, characterization, or remediation required under this **Section 3.6**.

3.7 Access to Parcels. The City agrees that Builder, its agents, employees, designees and, contractors shall have the right, at all reasonable times, of access to and entry upon the City Property and any Parcel of Private Property which the City then owns or has possession of for the purpose of obtaining data, making surveys and conducting tests necessary to carry out the transactions and development contemplated by this Agreement. Builder shall indemnify, defend and hold the City and its agents and representatives harmless from any and all injuries, damages, claims, costs, fees (including court costs and witness and attorney's fees), losses, damages and liabilities of any kind, expressly excluding those incurred as the result of the negligence or willful misconduct of the City or its officers, agents, contractors or employees but including, without limitation, mechanics' or materialmen's liens, which may be asserted against or incurred by the City, the City Property or any such Parcel of Private Property resulting from, or arising out of, such access and entry by Builder, its agents, employees, designees or contractors pursuant to the terms of this **Section 3.7**. Notwithstanding any provision in this Agreement to the contrary, Builder and the City agree that the foregoing indemnification obligations shall survive the closing of any transaction involving the Parcels or the rescission, cancellation or termination of this Agreement for any reason.

3.8 Data From the City. Upon Builder's written request, the City shall provide Builder with access to any and all data and information as the City may have pertaining to the Redevelopment Area which is not otherwise confidential or privileged materials or any City Attorney files. Builder agrees that it shall not attempt to assert any liability against the City by reason of the City's having furnished any data or information pursuant to the terms of this Agreement or by reason of any such data or information becoming or proving to have been incorrect or inaccurate in any respect.

3.9 Section 108 Loan. The City has submitted and is diligently pursuing its application for up to $7,000,000.00 in loan funds for the Retail Project from the Department of Housing and Urban Development's Section 108 loan fund pool (the "**Section 108 Loan**"). Subject to **Section 10.18** below, upon the granting of the Section 108 Loan, in whole or in part, the Section 108 Loan proceeds shall be deposited with American International Group ("**AIG**") or such other party satisfactory to the City (the "**Holder**"). The Holder shall disburse the funds in a manner mutually agreed upon by the City, Builder, and the Holder to pay for the costs and expenses incurred by Builder in fulfilling the ICR Commitment. It is agreed to by the parties, that the BEDI Grant as described in **Section 3.10** and the $900,000 Reserved Deposit as described in **Section 8.2.1.2 of the MRA** shall be the primary sources of funds for the initial repayment of the Section 108 Loan, until such amounts are exhausted. In the event that the BEDI Grant and the Reserved Deposit have been expended for loan repayment and seventy (70%) percent of the Sales Tax revenue generation from the Retail Project is delayed or is insufficient to cover ongoing loan payments, the Builder will guarantee the loan payments, until offset by the aforementioned Sales Tax revenues generated by the Project.

3.10 BEDI Grant. The City has submitted an application and has been approved for up to $1,000,000.00 as a Brownfields Economic Development Incentive Grant (the "**BEDI Grant**"). The City shall use the funds from the BEDI Grant (the "**BEDI Funds**") to cover the interest payment obligations under the Section 108 Loan.

3.11 Dedication, Acceptance and Maintenance of Public Improvements. Public Improvements is defined herein as improvement to streets, utilities, storm water retention facilities and other infrastructure ("**Public Improvements**") that will be owned by the City. When all or a portion of the Public Improvements are completed, then upon written request of Builder, the City shall, in accordance with all city, state, federal and other laws, requirements or policies, accept such Public Improvements. Upon acceptance, the Public Improvements shall become public facilities and property of the City and the City shall bear all risk of loss, damage or failure to such Public Improvements. Until acceptance by the City, Builder shall bear all risk of loss, damage, or failure to the Public Improvements.

3.12 Compliance with Laws. Builder agrees to comply with all applicable federal, state, and city statutes, rules, regulations and codes relating to the Retail Project.

ARTICLE IV

CONDITIONS

4.1 Conditions to Obligations of Builder. Builder's obligation to consummate the transactions contemplated by this Agreement is subject to the satisfaction of all of the following conditions precedent. Failure of the City to satisfy any of the conditions precedent shall not act as a breach of this Agreement. Rather, the Builder's sole and exclusive remedy is termination of this Agreement and neither the City nor the Builder shall have any further liability or obligation under this Agreement. Except that the Builder shall have the right, but not the obligation, to waive any or all of the conditions which waiver shall be in writing signed by Builder or its duly authorized agent.

4.1.1 **Rezoning.** The Property is rezoned in the manner necessary to permit the redevelopment contemplated by the Redevelopment Plan and the Project for the Property, as then modified or amended, and such rezoning is final (i.e., not subject to appeal or referendum challenge).

4.1.2 **Section 108 Loan.** The City obtains at least $7,000,000.00 in Section 108 Loan funds.

4.1.3 **Acquisition and Conveyance of State Trust Lands and ADOT Lands.** As of the effective date of this Agreement, there exist certain parcels of land owned by the Arizona State Land Department as Arizona State Trust Lands ("**State Trust Lands**") and by the Arizona Department of Transportation ("**ADOT Property**"). The State Trust Lands and the ADOT Property shall be acquired by the City. After the City has acquired title to these parcels, the City shall convey them to Builder. Builder acknowledges that conveyance by the City cannot take place without the City Council's prior approval, by Ordinance. Accordingly, the provisions of this **Section 4.1.3** are conditioned upon both the City Council's adoption and approval of an Ordinance authorizing these conveyances. Failure of the City to acquire these parcels or failure of the City Council to adopt the conveyance Ordinance shall result in either a termination of this Agreement or a modification in its scope, at the discretion of Builder. In any event, if the City fails to acquire and convey these parcels, the City shall reimburse Builder for all costs and expenses Builder incurred in connection with the City's attempted acquisition and/or conveyance.

4.1.4 **Conveyance/Abandonment of City Property.** At a mutually acceptable time, the City shall convey and/or abandon the City Property to the Builder. Such conveyance and/or abandonment shall be at no cost to the Builder, however, Builder acknowledges that the City's conveyance is conditioned upon the City Council's adoption and approval of an Ordinance authorizing any conveyance. Failure of the City Council to adopt the conveyance Ordinance shall result in either a termination of this Agreement or a modification of its scope, at the discretion of the Builder.

4.2 **Termination by Builder.** In the event Builder exercises its right to terminate this Agreement pursuant to **Section 4.1** above, then (a) Builder shall reimburse the City for all costs associated with abandonment of condemnation proceedings pertaining to the Property as part of the reimbursement of costs and expenses to the City pursuant to **Section 5.5.2** below, (b) Builder will cooperate with the City in facilitating the return of any Section 108 Loan funds that are in the possession of the Holder pursuant to the transfer described in **Section 3.9** above, and (c) Builder will reconvey to the City any property owned by it pursuant to the conveyance by the City pursuant to **Section 4.1.4** above.

ARTICLE V

EMINENT DOMAIN

5.1 Eminent Domain Proceedings. In the event Builder, after good faith efforts, is unable to acquire one or more Parcels of Private Property which Builder intends to improve or cause to be improved pursuant to this Agreement then the City may, as authorized by separate Council approval and after meeting all legal requirements, acquire said Parcel(s) (the "**Condemned Property**") through exercise of the power of eminent domain, subject to the following terms and conditions and all other terms of this Agreement:

5.2 Use by Others. This Agreement does not preclude any person or entity who is not a party to this Agreement from developing, redeveloping or using one or more Parcels within the Property in any lawful manner prior to the condemnation or sale of such Parcel(s).

5.3 Determination by the City. The City shall determine whether to initiate and proceed with condemnation proceedings by separate resolution of the City Council after the City determines that the Parcel is located within the Redevelopment Area and is necessary for the redevelopment contemplated by this Agreement, the Master Developer and Builder have made a commercially reasonable effort to purchase the Parcel by negotiation with the owner, and in the City's reasonable judgment, eminent domain proceedings to obtain such Parcel are legally proper and appropriate under the terms of this Agreement and all applicable law.

5.4 City Council Authorization. Notwithstanding any provision of this Agreement to the contrary, the City shall have no obligation to exercise its power of eminent domain under this **Article V** unless the City Council has passed a resolution authorizing the use of such power for the purposes set forth in, and subject to the terms of, this Agreement. Failure of the City Council to take such action shall not constitute a breach of this Agreement, but failure of the City Council to take such action with respect to property essential to the Retail Project as reasonably determined by Builder shall entitle Builder to terminate this Agreement.

5.5 Condemnation Costs and Expenses. The intent of this Agreement is that all reasonable condemnation costs and expenses and all other costs and expenses of the real estate transactions contemplated by this Agreement shall be paid (or reimbursed to the City within sixty (60) days, if applicable) by Builder, without any cost to the City, except for any City employees' time or the City's general overhead expenses related to such transactions, which shall not be reimbursed. Without limiting the foregoing, the following shall apply:

5.5.1 Purchase Price. Builder shall pay to the City, as the purchase price for each Condemned Property: (a) the amount established as the fair market value of and just compensation for the land and improvements and any severance or other damages awarded in proceedings filed pursuant to this Agreement, as well as any interest charges, attorney's fees, court costs, bond charges, jury fees and other amounts paid by the City to the owner, the court or any other person in connection with the condemnation of such Condemned Property; or (b) the amount paid to the owner of the Condemned Property as a negotiated purchase price in the event such Condemned Property is purchased prior to

the conclusion of eminent domain proceedings plus all title and escrow fees and other transactional expenses, if any, incurred by the City in connection with such purchase.

5.5.2 Costs and Expenses. Builder shall also pay all reasonable expenses incurred by the City, directly or indirectly, in obtaining the Condemned Property. Without limiting the generality of the foregoing, Builder shall pay all environmental, investigation and/or report costs, title report, title policy and escrow fees, along with all direct and indirect costs, including attorneys' fees (for litigation, negotiations, documentation or otherwise) and related costs; filing fees; service of process fees; interest on awards and other similar amounts; jury costs; costs for deposition transcripts and the preparation of exhibits; relocation costs and all other costs of every kind or nature relating to the City's acquisition of any portion of such Condemned Property. In order to maintain some reasonable control over these costs, the City and Builder agree where feasible to establish pre-approved budgets for each service for which the City normally establishes a budget. In situations where pre-approved budgets are not feasible, the City agrees to exercise reasonable control over the service provider to see that costs are consistent with the market rate for that service. Notwithstanding the foregoing, Builder shall not be required to pay for any City employee's time or the City's general overhead expenses related to obtaining any Condemned Property by eminent domain or otherwise.

5.5.3 Interest. Builder shall be responsible for the payment of legal interest, if any imposed on awards and for all other obligations related to condemnation awards.

5.5.4 Risk. The risk of the City's inability to acquire any Parcel through eminent domain is imposed on Builder and the City shall have no liability therefor. Failure of the City to acquire any Parcel as a result of a final, non-appealable adverse court order, shall not constitute a breach of this Agreement, but this Agreement shall automatically be deemed to be amended to exclude such Parcel from the Property and Redevelopment Area and Builder shall have no obligation to remediate, redevelop or perform any other services for such Parcel. Upon the written request of either party, the other party shall join the requesting party in executing, acknowledging and recording in the Maricopa County Recorder's Office an amendment to this Agreement evidencing such modification, in accordance with the terms of this Agreement.

5.6 Commencement of the City's Activities. Upon Builder's satisfaction of the conditions precedent set forth in **Section 5.5.2** of this Agreement and all other requirements that are to be satisfied prior to the commencement of eminent domain proceedings with respect to a particular Parcel, and in the event the City approves the commencement of eminent domain proceedings, the City shall initiate the appropriate eminent domain proceedings for such Parcel in accordance with the City's usual and normal standards and procedures and shall pursue such proceedings to conclusion. Such procedures shall include the following activities:

5.6.1 Litigation Guarantee Title Report. The City shall obtain a litigation guarantee title report for the subject Parcel from the title company under general contract with the City.

5.6.2 Condemnation Appraisal. The City shall obtain an appraisal for the subject Parcel ("**Condemnation Appraisal**") which shall be prepared in accordance with the Uniform Standards of Professional Appraisal Practice and the City's standards and guidelines by an Arizona certified general real estate appraiser approved by the City.

5.6.3 Offer by the City. The City shall present a final written offer and copy of its appraisal report to the owner of the Parcel in the full amount of the Condemnation Appraisal or Builder's highest offer to such owner, whichever is higher. The City shall provide Builder with a complete record of all such offers and shall convey to Builder all counteroffers made by the owner as soon as practicable. Any such negotiations shall be conducted according to the procedures set forth in **Section 5.9** of this Agreement.

5.6.4 Commencement of Eminent Domain Proceedings. Unless the owner accepts the City's final written offer pursuant to **Section 5.6.3** of this Agreement, the City shall promptly initiate eminent domain proceedings in the Court in accordance with its usual and normal legal procedure as permitted by law. The City shall not be responsible and shall have no liability if, the City fails to acquire any Parcel by condemnation. However, this provision does not relieve the City from the obligation to pursue the acquisition of the subject Parcel through the condemnation proceedings, once the process has been initiated.

5.6.5 City Control. The City shall control all matters relating to the eminent domain proceedings.

5.7 Relocation. Upon the City's initiation of eminent domain proceedings, the appropriate City staff shall review the applicable file and shall initiate all necessary relocation activities in accordance with the City's usual and normal standards and procedures. Such activities shall include a review of all applicable records, personal contacts, the location of replacement property and the determination by the City, in the exercise of its reasonable judgment, of relocation payments and services due to the owner and, if applicable, tenants. Such determination shall be made subject to, and in accordance with, the following provisions:

5.7.1 Relocation Benefits and Services. The City shall be the sole agent and provider of relocation benefits and services and shall have final authority on all matters related to relocation, which authority shall be exercised in its reasonable judgment before the final relocation payment is made; provided, however, that the City agrees to consult with Builder regarding the scope of the relocation benefits.

5.7.2 Compliance With Laws. Relocation services shall be provided in accordance with applicable laws and City procedure.

5.7.3 Case Files. The City shall maintain a case file for each eligible displacee.

5.7.4 Responsibility for Relocation Costs. Builder shall be responsible for all costs (except for any City employees' time and the City's general overhead related to such relocations), including outside relocation agent fees and expenses, benefit amounts

and any costs incurred as a result of any legal action taken against the City on any matter related to relocation (except for costs incurred as a result of the negligence or willful misconduct of the City or its officers or employees).

5.8 Possession of Condemned Property. Possession of Condemned Property shall be subject to the following provisions:

5.8.1 Immediate Possession by the City.

5.8.1.1 Request by Builder. Builder may request in writing that the City obtain immediate possession pursuant to A.R.S. § 12-1116 of a Parcel being condemned in accordance with this **Article V**. Builder shall either post cash or a bond in such amount and form as may be required in order to satisfy the requirements of the Court or a stipulated deposit pursuant to A.R.S. § 12-1116 and shall be responsible for all additional expenses incidental to the immediate possession request.

5.8.1.2 Action by the City. If deemed necessary or appropriate by the City or upon the written request of Builder in accordance with **Section 5.8.1.1** of this Agreement, the City shall seek immediate possession of any Condemned Property.

5.8.2 Management Following Possession. If the City obtains possession, the City shall grant immediate possession by means of an instrument substantially in the form of **Exhibit K** hereto, upon proof of adequate insurance naming the City as additional insured, to Builder and thereupon Builder shall have sole responsibility for managing and maintaining such Condemned Property, regardless of whether title to the Condemned Property has been conveyed to Builder. The City will not assume any property management responsibilities.

5.8.3 Maintenance Standards. Once granted possession of a Condemned Property, Builder shall maintain such Condemned Property in a decent, safe and sanitary condition and, in the case of residential rental property, shall abide by the Arizona Residential Landlord and Tenant Act (A.R.S. §§ 33-1301, et seq.).

5.8.4 Interim Leasing of Condemned Property. In the event the City and Builder agree to lease any Condemned Property for a period of time prior to commencing redevelopment, rent-back amounts shall be determined by the City after consultation with Builder. Any rent proceeds for such interim use of the Condemned Property shall be deemed the property of Builder.

5.8.5 Relocation Ineligibility Notice. Prior to allowing interim occupancy pursuant to **Section 5.8.4** of this Agreement, the City shall provide written notification of relocation ineligibility to all tenants who lease and/or occupy a Condemned Property subsequent to transfer to Builder.

5.9 Conveyance of Title.

5.9.1 Conditions to Conveyance. The Builder acknowledges that conveyance of any Parcel obtained by the City by eminent domain proceedings cannot take place without the City approving, by Ordinance, a sale of the Parcel to the Builder. Accordingly, the provisions in this **Section 5.9 and Section 5.10** are specifically conditioned upon the City Council adopting and approving of such sale. Failure to do so shall not constitute a breach of this Agreement, and the Builder's sole and exclusive remedy for a failure to deliver fee title to the Builder is a termination of this Agreement.

5.9.2 Time of Conveyance. Assuming that the Builder is not in breach of this Agreement and subject to any mutually agreed upon extension of time or any court order delaying the delivery of possession or the granting of immediate possession, the Parties agree that within sixty (60) days of the filing of a final order of condemnation for a Condemned Property and the payment of the judgment by the City , the City shall convey fee simple title to such Condemned Property to Builder. The City and Builder agree to perform all acts necessary for such conveyance of title to be completed within the sixty-(60) day period set forth above.

5.9.3 Form of Conveyance to Builder. The City shall convey title to each Condemned Property to Builder by warranty deed in the form of **Exhibit E** (the "**City Deed**"), free and clear of all adverse interests.

5.9.4 "As-Is" Condition. Each Condemned Property shall be conveyed in an "as-is" condition, with no warranty or representation (other than the warranty of title), express or implied, of any type or nature whatsoever being made by the City, including, without limitation, any representation or warranty regarding the condition of the soil, its geology or the presence of known or unknown faults or environmental contamination. Notwithstanding the foregoing provision, the City is not relieved of liability for any deliberate or negligent acts of its employees, agents, officers, contractors and/or representatives that independently cause environmental contamination on any such Parcel and/or to adjacent property. The Builder acknowledges that the Property and the Redevelopment Area is within the flight corridor for Sky Harbor International Airport and therefore certain land uses and noise level reduction measures may be required.

5.10 Final Reconciliation.

5.10.1 Payment of Expenses by Builder. Prior to conveying title to a Condemned Property to Builder, the City shall compute the final total amount of actual expenses to be paid by Builder for such Condemned Property. If there is a deficiency in the cash deposit previously posted for such Condemned Property, or if the previous deposit was in a form other than cash, Builder shall post with the City sufficient cash, in the form of a cashier's check or certified check, to establish a cash deposit in an amount equal to the actual total costs and expenses owed by Builder for such Condemned Property pursuant to **Section 5.5** of this Agreement.

5.10.2 Release of Excess Cash. After reconciliation of the deposit account and posting all necessary cash as provided in this Agreement, the City shall release any excess cash and all other forms of surety related to such Condemned Property, except that the City shall retain any portion of the deposit related to relocation costs or other anticipated costs which cannot be finally calculated at the time of transfer of title, or if the City reasonably determines there is a deficiency for such anticipated costs, the City may require an additional deposit.

5.10.3 Continued Obligations of Builder. The reconciliation described in **Section 5.10.2** above does not absolve Builder from the obligation to pay to the City all amounts determined to be owed under this Agreement.

5. 10.4 Interest-bearing Account. Cash deposits received by the City from Builder pursuant to this Agreement shall be placed in an interest-bearing account designated by the City. Interest on such deposits shall accrue for the benefit of the Builder but shall remain in the deposit account pending final reconciliation and disbursement.

5.11 Negotiated Purchase. If, following Builder's failure to purchase a Parcel of Private Property, the City conducts any subsequent negotiations with the owner of Private Property, the City shall make all offers to the owner in writing and provide Builder with a complete record of negotiations. The City shall not accept any offer or counteroffer from the owner for an amount higher than the City's appraised value in the Condemnation Appraisal without written authorization from Builder. The provisions of this **Section 5.11** shall apply to any negotiations that occur at any point in any condemnation proceeding.

5.12 The City's Use of a Private Attorney. The City shall have the right to select and employ outside counsel at Builder's expense to prosecute any condemnation proceeding filed pursuant to this **Article V**. The City shall obtain Builder's reasonable approval before the City makes its decision regarding retention of counsel.

ARTICLE VI

BUILDER'S DEVELOPMENT SCHEDULE, PROCESS AND COMPLETION

6.1 Schedule of Performance. The City and Builder intend that the master-planning and development of the Property shall be achieved pursuant to, or in accordance with the milestones set forth on, the schedule of performance attached as **Exhibit F** (the "**Schedule of Performance**"). Builder and the City shall each use commercially reasonable efforts to ensure that the master planning and development of the Property occurs in accordance with the Schedule of Performance.

6.2 Conceptual Site Plan. The Builder has prepared a conceptual site plan (the "**Conceptual Site Plan**"), herein identified as **Exhibit G,** which sets forth the scope of development for the entire Property depicting the types of basic land uses, permissible range of

the intensity and density of such uses, and a permissible range in the relative height, bulk and size of buildings and structures on the Property. The intensity and density of the land uses within the project as described in the Conceptual Site Plan shall be allowed to be flexible in refinement of the Preliminary PAD and Final PAD within a range of 900,000 sq.ft. to 1,400,000 sq.ft.

6.3 Preliminary PAD. The Property shall be developed in general conformance with the Conceptual Site Plan. By the date set forth in the Schedule of Performance, the Builder shall submit to City the Preliminary and Final PAD application for the Property, in accordance with normally applicable City submission requirements for such applications.

6.4 Signage. The City and the Builder acknowledge and agree that a distinctive characteristic of the Property is its location at the intersection of the 101 and 202 Freeways. As a result, the City and the Builder agree that appropriate signage (including tenant distinctive signage), subject to City review and approval is an integral part of the development of the Property and may be necessary to attract users and occupants to the Property. The City acknowledges that such appropriate signage is likely to require variances from the City's existing ordinances and regulations, which the City shall reasonably address as part of development approvals.

6.5 Approvals. The City hereby agrees that, in connection with all approval requests relating to the development of the Property and the construction of any Improvements, no new, unusual or extraordinary plan or review requirements, conditions or stipulations will be imposed on Builder.

6.6 Certificate of Completion. Promptly after substantial completion of the construction of any Improvement on the Property in accordance with the Final Plan of Development approved by the City with respect to the Property, but in no event later than the issuance of a certificate of occupancy for an Improvement, the City shall furnish to the Builder a certificate of completion ("**Certificate of Completion**") certifying that the construction of the Improvement has been completed. Upon issuance of the Certificate of Completion, Builder may record the Certificate of Completion in the Maricopa County Recorder's office. If the City refuses or fails to issue the Certificate of Completion, the City shall, within five (5) days after written request by the Builder, issue a written statement indicating in adequate detail why the Certificate of Completion was not issued by the City and what measures or acts the City reasonably requires before the City will issue the Certificate of Completion.

6.7 Review and Inspection Process. The City acknowledges and agrees that it is desirable for Builder to proceed rapidly with the implementation of this Agreement and the development of the Property and that an expedited review and construction inspection process is necessary. Accordingly, the parties agree that the City will provide expedited review for development of the Property and that if at any time Builder believes an impasse has been reached with the City staff on any issue affecting the Property, Builder shall have the right to immediately appeal to the Development Services Manager for an expedited decision. Notwithstanding anything contained in this Agreement to the contrary, in the event the City does not have sufficient number of personnel to implement the expedited development review process or the expedited construction inspection process, Builder may elect to pay the cost incurred by the City for private independent consultants and advisors which may be retained by the City, as

necessary, to assist the City in the review and/or inspection process; provided, however, that such consultants shall take instruction from, be controlled by, and be responsible to the City and not Builder.

6.8 Representatives. To further the cooperation of the parties in implementing this Agreement and to expedite decisions by the City relating to the Project, the City agrees to designate a representative ("**City Representative**") of the City to act as a liaison between the City and Builder and between the various departments of the City and Builder. The City Representative shall be available at all times to serve as such liaison, it being the intention of this section to provide Builder with one individual as the City's principal representative with respect to the Project. Builder shall also designate representatives ("**Builder Representatives**") who shall serve as a liaison between Builder and the City. The initial City Representative shall be Neil Calfee and the initial Builder Representatives shall be David Larcher, and Brad Wilde or their designees.

ARTICLE VII

IMPROVEMENT DISTRICT

7.1 Creation of Improvement District. The City and Builder agree to consider the creation of one or more improvement districts (the "**Improvement District**") on or adjacent to the Property or the Redevelopment Area to finance the design and construction of on-site and off-site public infrastructure in accordance with Arizona law and pursuant to and in accordance with the terms and conditions of a Development and Waiver Agreement in a form to be agreed to by the parties (the "**ID Agreement**"). As more particularly set forth in the ID Agreement, repayment of all bonds issued by the Improvement District for the purpose of paying the costs and expenses of construction of the District Improvements described therein shall be paid by assessments established by the Improvement District and imposed against parcels within the Improvement District.

ARTICLE VIII

PROPERTY TAX ABATEMENT, ASSESSMENT AND ECONOMIC INCENTIVES

8.1 Payments and Incentives to Builder. In recognition of the benefits to the City's citizens of development of the Property and the Redevelopment Area, and in partial consideration for undertaking all of Property's obligations under this Agreement, the City shall make the following payments, rebates and reimbursements to and on behalf of Builder, and shall grant to Builder the following concessions, credits and waivers (collectively, the "**Incentives**"). The amount of these Incentives has been based on the demonstrated need identified by the Project proforma. The Incentives shall be limited to Improvements for which the City issues a building permit (which permit the City shall not unreasonably withhold) within twenty four (24) months of the acquisition of possession by Builder of all the Property necessary for the development of the Retail Project. Builder shall provide City written notification of such date which shall be no later than the closing of Builder's construction loan for construction of the

Property. It is provided, however, if Builder obtains Certificates of Completion or certificates of occupancy of the developable square footage authorized by the Final PAD for 750,000 gross leasable square feet (including garden centers of major tenants) within such twenty-four (24)-month period, the Incentives shall apply to Improvements for which the City issues a building permit within forty-eight (48) months of the expiration of the twenty-four (24)-month period described in this **Section 8.1**. The time periods set forth herein are subject to **Section 10.17**.

8.2 Reimbursement Obligation of the City.

8.2.1 Reimbursement Amount. The City agrees to pay the amounts set forth on **Exhibit J** (the "**Reimbursement Amount**") to or on behalf of Builder in accordance with the terms of this **Article VIII** as reimbursement of a portion of the Project Costs and/or other expenses incurred by Builder under this Agreement in connection with the development of the Property, including but not limited to, the construction costs for the Public Improvements.

8.2.1.1 Calculation of Reimbursement Amount. The Reimbursement Amount constitutes the City's reasonable calculation of the minimum costs that would be incurred by the City for planning, land acquisition, environmental remediation, overhead and the construction of Public Improvements within or adjacent to the Property.

8.2.2 Allocation and Deposit of Revenues. Subject to the limitations set forth in **Section 8.2.3.1** of this Agreement, one hundred percent (100%) of Construction Sales Taxes and seventy percent (70%) of all unrestricted transaction privilege taxes imposed by the City (currently 1.7%) (exclusive of the .1% for the Arts) (the "**Sales Tax**") generated and paid by the Retail Project's users and received by the City for a period of fifteen (15) years, shall be utilized for the purposes of satisfying the payment obligations under the 108 Loan, and payment obligations to Builder (the "Reimbursement Amount") as set forth on **Exhibit J**. The parties acknowledge that the restricted privilege tax of 0.1% for the arts shall always be excluded from the Reimbursement Amount, but that the 0.5% for transit shall be included due to public transit improvements on the Property.

8.2.3 Semi-Annual Reimbursement Payments.

8.2.3.1 Source and Allocation of Payments. Subject to the terms of this Agreement, the reimbursement payments designated in this **Article VIII** shall be paid by the City from the Sales Tax revenue to or on behalf of Builder and shall be credited and disbursed in the following priority: **first**, to satisfy all periodic payment obligations under the Section 108 Loan as they become due and payable but only if and to the extent BEDI Funds and the Reserved Deposit described in **Section 8.2.1.2 of the MRA** are no longer available to make such payments because such sources of payments are exhausted; and **second**, the balance, if any, shall be paid to Builder on a semi-annual basis up to the Reimbursement Amount as set forth on **Exhibit J**. Nothing in this Section shall be construed to require the

City to make any payment until Sales Tax revenue is actually generated and received from the Property.

8.2.3.2 Reimbursement Period. The first periodic payment by the City to the Builder shall be made within forty-five (45) days of the end of the first six (6) full months following the end of the month in which Certificates of Completion or certificates of occupancy are issued for 750,000 square feet of gross leasable area (including garden centers of major tenants) of the Improvements on the Property. Periodic payments shall be made in the accordance with the payment priority established in **Section 8.2.3.1** of this Agreement. Periodic payments shall be made every six (6) months from then on until fifteen (15) years from the anniversary of the Certificates of Completion or certificates of occupancy reaching or exceeding such 750,000 square foot figure, and the City's reimbursement obligation under this **Section 8.2** shall then terminate. The City shall make each periodic payment not later than forty-five (45) days after the receipt of the applicable tax returns and tax payments for the period to which the City' payment relates.

8.2.4 Limitations on Payments to Builder .

8.2.4.1 Allocated Revenues Limitation. The City shall in no event be required to pay to or on behalf of Builder, with respect to any period, any greater amount than the Allocated Revenues actually received by the City in or prior to such period and credited (or which properly should have been credited) from the Sales Tax revenues.

8.3 Tax Abatement Incentives.

8.3.1 Tax Abatement. The City agrees that the increased costs of environmental remediation and of constructing the Improvements makes the development of the Property economically feasible only if the City provides Builder with all statutorily-authorized property tax abatements, including, without limitation, all such abatements currently available pursuant to the provisions of A.R.S. §§ 42-6201 through 42-6209, inclusive. However, Builder shall be responsible for a $50,000 annual in-lieu payment to Tempe during the abatement period, until such time as the combined property tax payments for the Property exceed $50,000 annually. In connection with such property tax abatements, the City hereby agrees that, at the request of the Builder the City shall accept reconveyance of land and conveyance of Improvements by deed substantially in the form attached hereto as **Exhibit H** and to lease-back all such land and Improvements to the Builder upon the terms and conditions set forth in a lease substantially in the form attached hereto as **Exhibit I**, subject to negotiations and City Council approval and subject to the following additional conditions:

8.3.1.1 Insurance Provisions for Lease. Any lease entered with the City for the purpose of providing statutorily-authorized property tax abatements shall provide that during the term of the lease, the tenant shall, at tenant's expense,

carry and maintain, for the mutual benefit of the City and tenant, commercial general liability insurance against claims for bodily injury, death or property damage occurring in, upon or about the premises, with limits of not less than $5,000,000 (which may include umbrella coverage for any amount above $1,000,000) combined single limit per occurrence for bodily injury and property damage, including coverages for contractual liability (including defense expense coverage for additional insureds), personal injury, broad form property damage, products and completed operations. All of tenant's policies of liability insurance shall name the City and all leasehold mortgagees as additional insured and shall contain no special imitations on the coverage, scope or protection afforded to the City, its officials, employees or volunteers. The tenant's policy of liability insurance shall be primary as respect to the City and any failure to comply with reporting provisions of the policies shall not affect coverage provided to the City. Certificates with respect to all policies of insurance required to be carried by the tenant shall be delivered to the City in form and with insurers acceptable to the City which shall clearly evidence all insurance required and provide that such insurance shall not be cancelled, allowed to expire or be materially reduced in coverage.

8.3.1.2. Indemnification Provision for Lease. Any lease entered with the City for the purpose of providing statutorily-authorized property tax abatements shall provide that during the term of the lease, the tenant shall indemnify, protect, defend and hold harmless, the City, its council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees and costs of defense arising, directly or indirectly, in whole or in part, out of the exercise of the lease.

8.4 Negotiation Respecting Water and Sewer Fee Deferral. The City and Builder agree to negotiate a potential deferral of sewer and water development/impact fees applicable to the Property on terms and conditions satisfactory to the City so as to more equitably coordinate the cost of providing water and sewer facilities with the timing of the use thereof over a ten-year period.

ARTICLE IX

DEFAULT; REMEDIES; TERMINATION

9.1 Events Constituting Default. A party hereunder shall be deemed to be in default under this Agreement if such party breaches any obligation required to be performed by the respective party hereunder within any time period required for such performance, including, without limitation, any failure to comply with the Schedule of Performance attached hereto as **Exhibit F**, as such time periods may be extended as a result of the failure of the other party to

this Agreement to act in a timely manner as may be required, and such breach or default continues for a period of ninety (90) days after written notice thereof from the non-defaulting party; provided, however, if such breach or default cannot reasonably be cured within such ninety (90) day period, then the party shall be in default if it fails to commence the cure of such breach within the ninety (90) day period and diligently pursue the same to completion. Absent written agreement to the contrary, if such default is not cured within the above-described period, this Agreement may be automatically terminated, at the sole and absolute discretion of the non-breaching party. A default under this Agreement shall not, in and of itself, constitute a default under the Lease to be executed by the Builder and the City with respect to improvements and land as referenced in **Section 8.3.1** in the circumstance where a building has been constructed on the property which is the subject of such Lease. Further, a default under the MRA shall not constitute a default under this Agreement and there shall be no default under this Agreement unless there has been a default by Builder under the terms of this Agreement.

9.2 Dispute Resolution. In the event that there is a dispute hereunder which the parties cannot resolve between themselves, the parties agree that there shall be a forty-five (45) day moratorium on litigation during which time the parties agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. The mediation shall be held under the commercial mediation rules of the American Arbitration Association. The mediator selected shall have at least five (5) years' experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the parties, or in such other fashion as the mediator may order. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation upon the conclusion of mediation.

9.3 No Personal Liability. No member, official or employee of the City shall be personally liable to the Builder, or any successor or assignee, (a) in the event of any default or breach by the City, (b) for any amount which may become due to the Builder or any successor or assign, or (c) pursuant to any obligation of the City under the terms of this Agreement.

9.4 Builder's Remedies. In the event the City is in default under this Agreement and fails to cure any such default within the time period required as set forth in **Section 9.1**. above, then, in that event, in addition to all other legal and equitable remedies which the Builder may have, the Builder may terminate this Agreement by written notice delivered to the City; provided, however, that any such termination shall not affect, and this Agreement shall continue in full force and effect with respect to, those parcels within the Property, that have been acquired by Builder (or as to which the right of possession has been transferred to Builder) and upon which a building has been constructed or substantial construction has commenced.

9.5 City's Remedies. In the event that the Builder is in breach under this Agreement by failing to develop the Property in accordance with the Schedule of Performance attached hereto as **Exhibit F** and the Builder thereafter fails to cure any such breach within the time period described in **Section 9.1** above, then the City shall have the right to automatically terminate this Agreement immediately upon written notice to the Builder; provided, however, that any such termination shall not affect, and this Agreement shall continue in full force and effect with respect to, those parcels within the Project that have been acquired by the Builder (or

as to which the right of possession has been transferred to Builder) and upon which a building has been constructed or substantial construction has commenced. No exercise by the City of remedies under this Agreement shall, in and of itself, entitle the City to exercise remedies under the Lease to be executed by the Builder and the City in the circumstance where a building has been constructed on the Property subject to such Lease.

9.6 Liability and Indemnification. The Builder shall unconditionally indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorneys' fees and costs of defense arising, directly or indirectly, in whole or in part, out of (i) the breach by the Builder of any obligation under this Agreement; and (ii) the exercise by the Builder of any rights relative to the City Property granted by this Agreement, except to the extent such damages are the result of the sole negligence or willful misconduct of the City, and (iii) any claims of inverse condemnation filed against the City.

9.7 Effect of Event of Termination. Upon the termination of this Agreement as the result of the default or breach of the Builder, the Builder shall have no further rights to develop the Property pursuant to this Agreement; provided, however, that any such termination shall not affect, and this Agreement shall continue in full force and effect with respect to, those parcels within the Project that have been acquired by the Builder (or as to which the right of possession has been transferred to Builder) and upon which a building has been constructed or substantial construction has commenced. No termination of this Agreement shall, in and of itself, result in termination of any Lease to be executed by the Builder and the City with respect to improvements and land as referenced in **Section 8.3.1** in the circumstance where a building has been constructed on the property subject to such Lease.

ARTICLE X

GENERAL PROVISIONS

10.1. Cooperation. The City and the Builder hereby acknowledge and agree that they shall cooperate in good faith with each other and use best efforts to pursue the economic development of the Property as contemplated by this Agreement. Unless another standard is specified in this Agreement, all consents and approvals provided for in this Agreement shall not be unreasonably denied, conditioned, or delayed.

10.2. Time of Essence. Time is of the essence of each and every provision of this Agreement.

10.3 Conflict of Interest. Pursuant to Arizona law, rules and regulations, no member, official or employee of the City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation,

partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to cancellation pursuant to A.R.S. § 38-511.

10.4 Insurance. Within ten (10) days after written request by the City, Builder will provide the City with proof of payment of premiums and certificates of insurance showing that the Builder is carrying comprehensive general liability insurance in an amount not less than $5,000,000. Such policies of insurance shall be placed with financially sound and reputable insurers, require the insurer to give at least thirty (30) days advance written notice of cancellation to the City, and will include the City as an additional insured on such policies.

10.5 Notices. All notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted by: (i) personal delivery; or (ii) by deposit in the United States mail, certified or registered, return receipt requested, postage prepaid, addressed to the Parties at the addresses set forth below, or at such other address as a party may designate in writing or (iii) by any express or overnight delivery service [e.g. Federal Express], delivery charges prepaid:

If to the City:

City Manager
City of Tempe
31 East Fifth Street
Tempe, Arizona 85281
Telephone: (480) 350-8884
Facsimile: (480) 350-8996

With a copy to:

City Attorney
City of Tempe
21 East Sixth Street, Suite 201
Tempe, Arizona 85281
Telephone: (480) 350-8227
Facsimile: (480) 350-8645

If to Builder:

Vestar Development Company
2425 East Camelback Road, Suite 750
Phoenix, Arizona 85016
Attn: David J. Larcher
Telephone: 602-866-0900
Facsimile: 602-955-2298

With copies to:

DLJ REAL ESTATE CAPITAL PARTNERS II, L.P.
2121 Avenue of the Stars, Suite 3000
Los Angeles, CA 90067
Attn: Robert Cavanaugh
Telephone: 310-282-7440
Facsimile: 310-282-5032

and

Vestar Arizona XLV, L.L.C.
2425 East Camelback Road, Suite 750
Phoenix, Arizona 85016
Attn: Allan J. Kasen, Esq.
Telephone: 602-866-0900
Facsimile: 602-955-2298

and

Allen Matkins, et al
515 South Figueroa, 7th Floor
Los Angeles, CA 90071
Attn: Michael Sfregola, Esq.
Telephone: 213-955-5556
Facsimile: 213-620-8816

and

Miravista Holdings, LLC
502 South College, Suite 303
Tempe, Arizona 85281
Attn: Bradley, D. Wilde and Roberta M. Barrett
Telephone: 602-359-8400
Facsimile: 480-449-9059

and

Gammage & Burnham
Two North Central Avenue, 18th Floor
Phoenix, Arizona 85004
Attn: Grady Gammage, Esq.
Telephone: 602-256-0566
Facsimile: 602-256-4475

and

Mariscal, Weeks, McIntrye & Friedlander, P.A.
2901 North Central, Suite 200
Phoenix, Arizona 85012
Attn: James T. Braselton, Esq.
Telephone: 602-285-5000
Facsimile: 602-285-5100

10.6 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona. This Agreement has been made and entered into in Maricopa County, Arizona.

10.7 Successors and Assigns. This Agreement shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

10.8 Waiver. No waiver by either party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

10.9 Attorneys' Fees. In the event of any actual litigation between the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury.

10.10 Severability. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the extent that the material obligations and intent of this Agreement are not vitiated.

10.11 Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

10.12 Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

10.13 Recordation of Agreement. This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by the City.

10.14 City Manager's Power to Consent. The City hereby acknowledges and agrees that any unnecessary delay hereunder would adversely affect the Builder and/or the development of the Property, and hereby authorizes and empowers the City Manager to consent to any and all requests of the Builder requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any amendment or modification of this Agreement.

10.15 Assignment. Subject to the provisions of this Agreement, Builder shall have the right to assign all of Builder's right under this Agreement, in whole or part, including but not limited to Builder's right to receive all or any portion of the Incentives. Builder shall retain its right to receive the Reimbursement Amount regardless of the status of title or ownership of any or all of the Property unless Builder expressly assigns such rights (which Builder may do). Specifically, and without limiting the foregoing, the City and Builder acknowledge that assignment of the rights and obligations under this Agreement may (and can) be made to the

following parties. VESTAR TM-OPCO, L.L.C., a Delaware limited liability company; any entity which has a member (or a member of a member) affiliated with or under common control with Vestar Arizona XLV, L.L.C. No assignment, however, shall relieve Builder of its obligations hereunder, except that an assignment by Builder in connection with the transfer of its interests in the Property shall relieve Builder of its obligations hereunder provided such transferee agrees to be fully bound by the provisions hereof and the City reasonably consents to such assumption, provided that such consent shall be automatic if the assumption is by an entity any of whose members is under common control with any member of Builder. Further, notwithstanding the fact that this Agreement is being recorded in the Official Records of Maricopa County, it is intended that this Agreement shall not be an encumbrance upon the title of any person purchasing or owning a portion of the Property, and that the terms and conditions of the Agreement are not covenants running with the land and that no person is bound by (or entitled to) the burdens and benefits of this Agreement unless such burdens are expressly assumed by or such benefits are expressly assigned to such person.

10.16 Rights of Lenders. The City is aware that financing for acquisition, development and/or construction of the Parcels and Improvements may be provided, in whole or in part, from time to time, by one or more third parties (collectively "Lender") and that Lender may request a collateral assignment of this Agreement as part of the collateral for its loan to Builder. The City agrees that such collateral assignments are permissible without further consent on the part of the City. In the event of an Event of Default by Builder, the City shall provide notice of such Event of Default, at the same time notice is provided to Builder, to any Lender previously identified to the City. If a Lender is permitted, under the terms of its agreement with Builder to cure the Event of Default and/or to assume Builder's position with respect to this Agreement, the City agrees to recognize such rights of Lender and to otherwise permit Lender to assume all of the rights and obligations of Builder under this Agreement. If the City shall give any notice, demand, election or other communication required under this Agreement (collectively "Notices") to Builder, the City shall concurrently give a copy of each such Notice to the Lender at the address designated by the Lender. Such copies of Notices shall be given to the Lender pursuant to the **Section 10.5**. No Notice given by the City to Builder shall be binding upon or affect the Lender unless a copy of the Notice shall be given to the Lender pursuant to this **Section 10.16**. In the case of an assignment of the Loan by the Lender or change in address of the Lender, the assignee or Lender, by written notice to the City, may change the address to which such copies of Notices are to be sent. The Lender shall have the right for a period of sixty (60) days after the expiration of any grace period afforded Builder to perform any term, covenant, or condition and to remedy any uncured default by the Builder or such longer period as the Lender may reasonably require to affect a cure, and the City shall accept such performance with the same force and effect as if furnished by Builder and the Lender shall thereby and hereby be subrogated to the rights of the City. Nothing contained in this Agreement shall be deemed to prohibit, restrict, or limit in any way the right of a Lender to take title to all or any portion of its collateral, pursuant to a foreclosure proceeding, trustee's sale, or deed in lieu of foreclosure. The City shall, at any time upon request by Builder or Lender, provide to any Lender an estoppel certificate, acknowledgement of collateral assignment, consent to collateral assignment, or other document evidencing that this Agreement is in full force and effect, that it has not been amended or modified (or, if appropriate, specifying such amendment or modification), and that no default by Builder exists hereunder (or, if appropriate, specifying the nature and duration of any existing

default) and certifying to such other matters reasonably requested by Builder or Lender. Upon request by a Lender, the City will enter into a separate assumption or similar agreement with such Lender consistent with the provisions of this paragraph.

10.17 Special Conditions Relating to Schedule of Performance. The City and Builder acknowledge that the Schedule of Performance may be affected by circumstances beyond the control of either City or the Builder arising from difficulties relating to environmental remediation, geotechnical work, condemnation proceedings, referendum or litigation. Builder shall not be deemed in default of the Schedule of Performance by reason of the foregoing matters so long as it is exercising commercially reasonable efforts to timely accomplish such performance.

10.18 Consent of Master Developer. Master Developer and Builder are finalizing agreements relating to the transfer of Master Developer's rights relating to the Property. Accordingly, in the event that Master Developer does not deliver a consent to this Agreement to Builder and the City within ninety (90) days of the Effective Date of this Agreement in the form attached hereto as **Exhibit L**, this Agreement shall be null and void and of no further force or effect. Further, the Section 108 Loan referenced in **Section 3.9** shall not be deposited with the Holder until such consent of Master Developer is delivered.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first set forth above.

BUILDER:

MIRAVISTA/VESTAR TM-LANDCO, L.L.C.

By: VESTAR TM-LANDCO, L.L.C.
Its: Managing Member

By: _____
Its: Manager

THE CITY:

CITY OF TEMPE, an Arizona municipal corporation

By: _____
Mayor

ATTEST:

_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by _____, Mayor of the City of Tempe, who acknowledged that he/she signed the foregoing instrument on behalf of the City.

_____
Notary Public

My commission expires:

_____

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by _____, Manager of _____, L.L.C., an Arizona limited liability company, who acknowledged that he signed the foregoing instrument on behalf of the company.

_____
Notary Public

My commission expires:

_____

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 2004, by _____, Manager of _____, L.L.C., an Arizona limited liability company, who acknowledged that he signed the foregoing instrument on behalf of the company.

_____
Notary Public

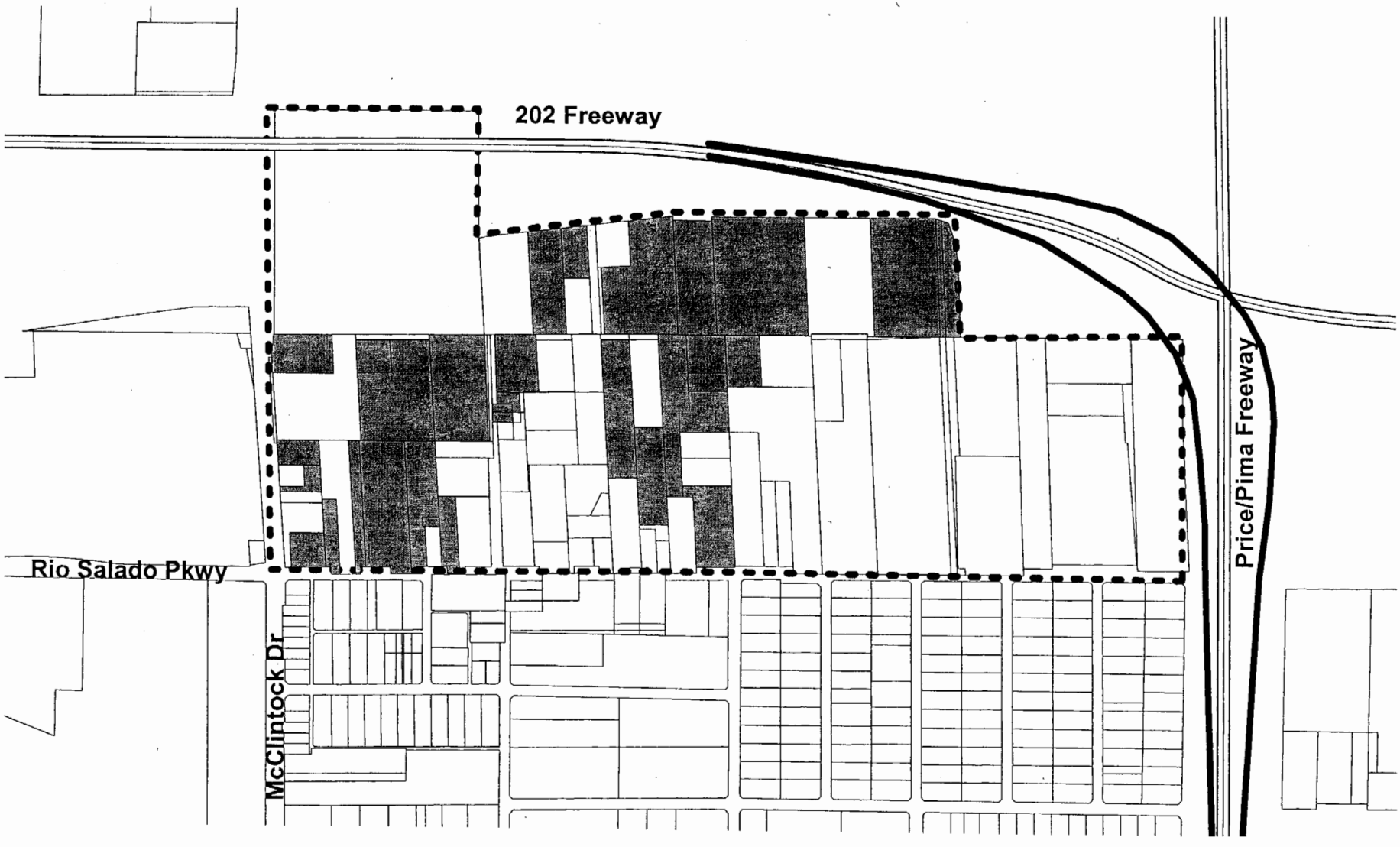
My commission expires:

_____

EXHIBIT A

Portion of Redevelopment Area
Applicable to Retail Project

EXHIBIT B



Builder Property

NORTH

EXHIBIT C

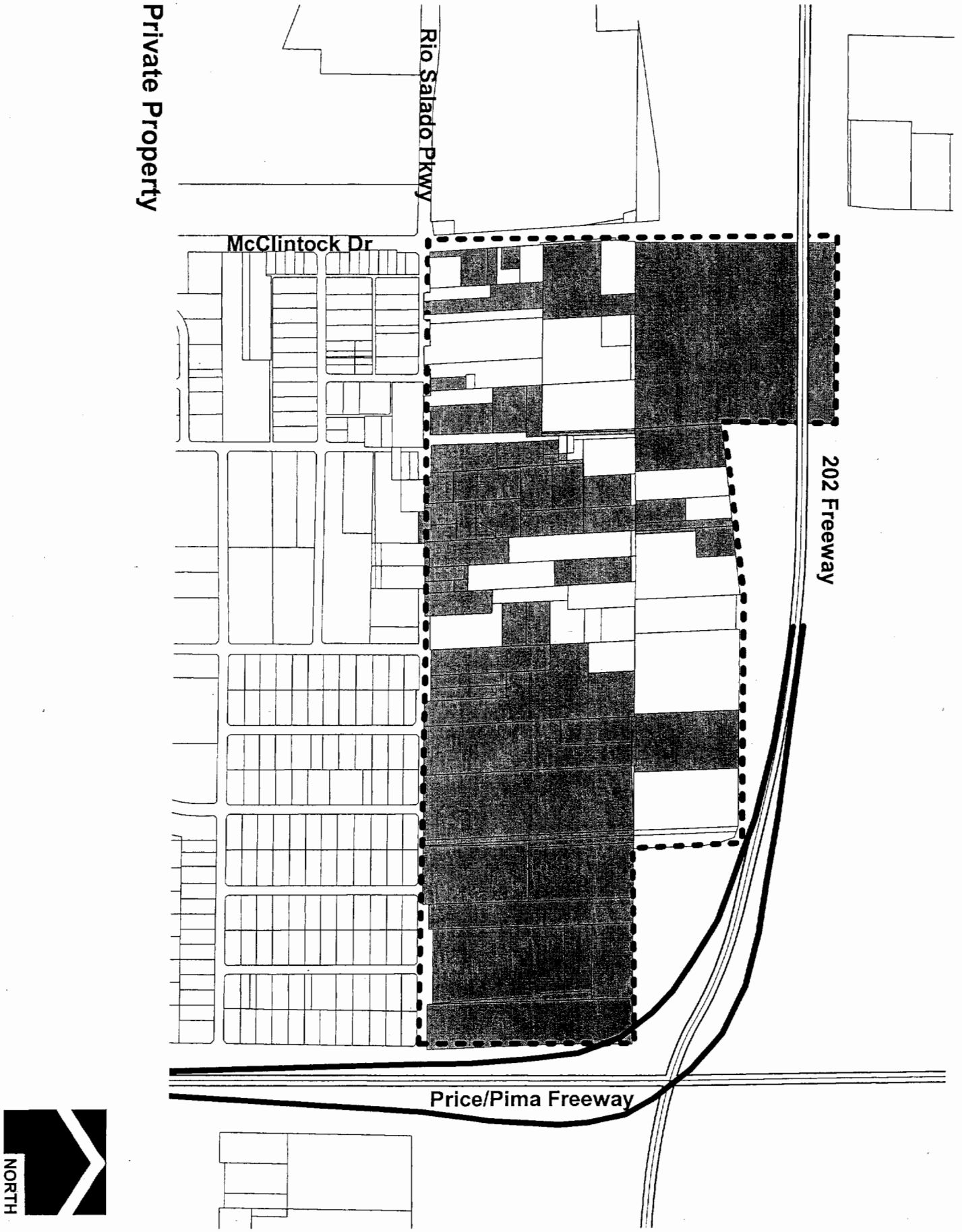

Private Property
Rio Salado Pkwy
McClintock Dr
202 Freeway
Price/Pima Freeway
NORTH

EXHIBIT D

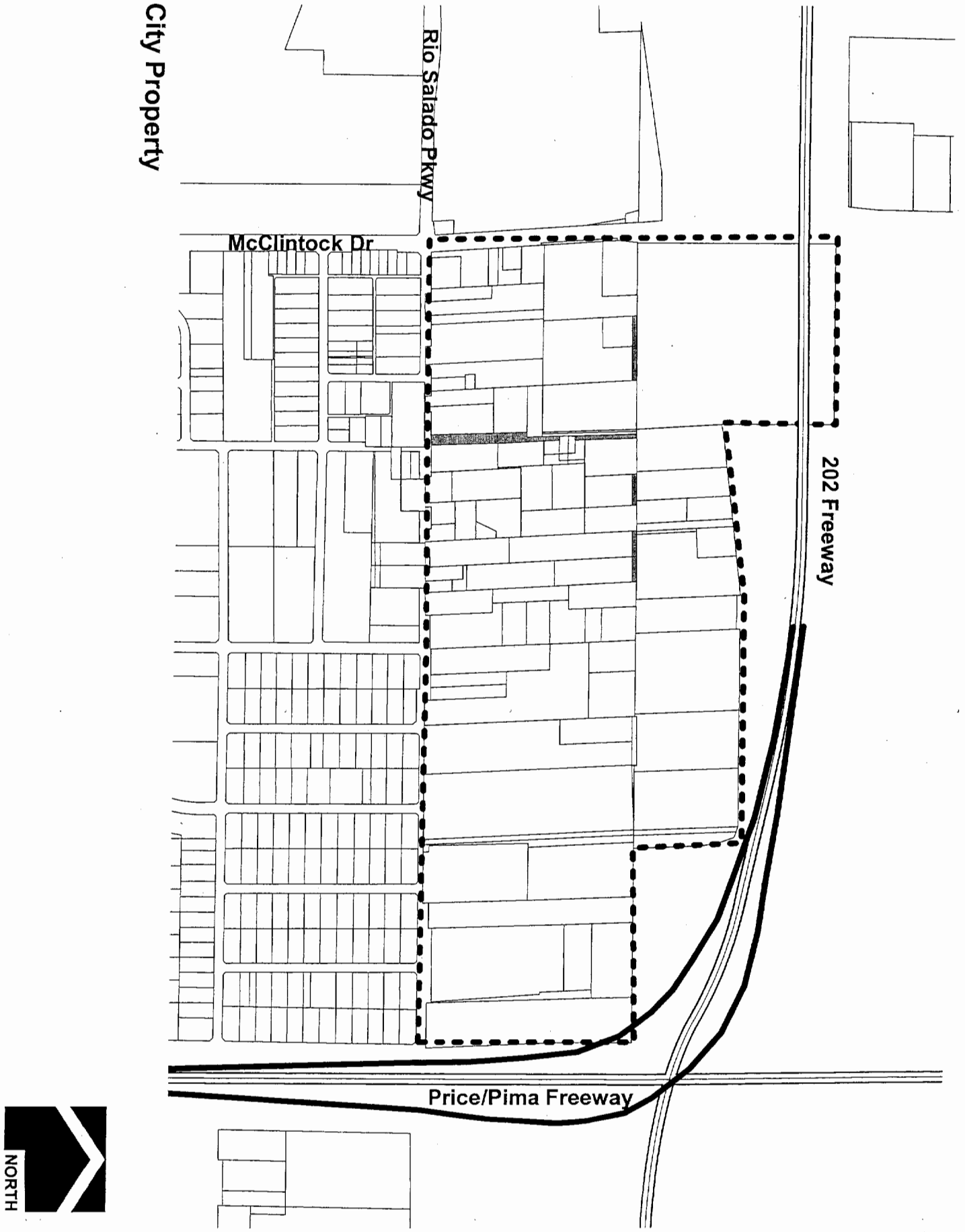

City Property
Rio Salado Pkwy
McClintock Dr
202 Freeway
Price/Pima Freeway
NORTH

EXHIBIT E

City Deed

When recorded, return to:

Marlene Pontrelli, Esq.
City Attorney
City of Tempe
140 East 5th Street
Tempe, Arizona 85244-4008

Escrow No.

WARRANTY DEED

For the consideration of Ten Dollars, and other valuable consideration, THE CITY OF TEMPE, an Arizona municipal corporation ("Grantor"), sells and conveys to _____, a[n] _____ ("Grantee"), the following described real property:

See Exhibit A attached to and incorporated in this Warranty Deed by this reference (the "Property")

SUBJECT ONLY TO: all taxes and other matters set forth on Exhibit B attached to and incorporated in this Warranty Deed by this reference.

Grantor hereby binds itself and its successors to warrant and defend the title to the Property, as against all acts of Grantor and no other, subject only to the matters above set forth.

Dated to be effective as of _____, 200__.

GRANTOR:
THE CITY OF TEMPE,
an Arizona municipal corporation

By: _____
Its: _____

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this ____ day of _____, 200__ by _____, the _____ of The City of Tempe, an Arizona municipal corporation, who acknowledged that he/she signed the foregoing instrument on behalf of the City.

_____
Notary Public

My Commission Expires:

_____

EXHIBIT F

SCHEDULE OF PERFORMANCE

Timeline to Perform Task from Execution of Agreement	Task/Obligation
3 months	Submit entitlement package including the preliminary and final PAD for Retail Project
12 months	Commence Environmental Clean-up and Geotechnical Work of the Phase I Improvements
28 months	Commence Substantial Construction of Phase I Improvements
52 months	Complete Substantial Construction of majority of buildable square footage approved per Final PAD

EXHIBIT G

Conceptual Site Plan

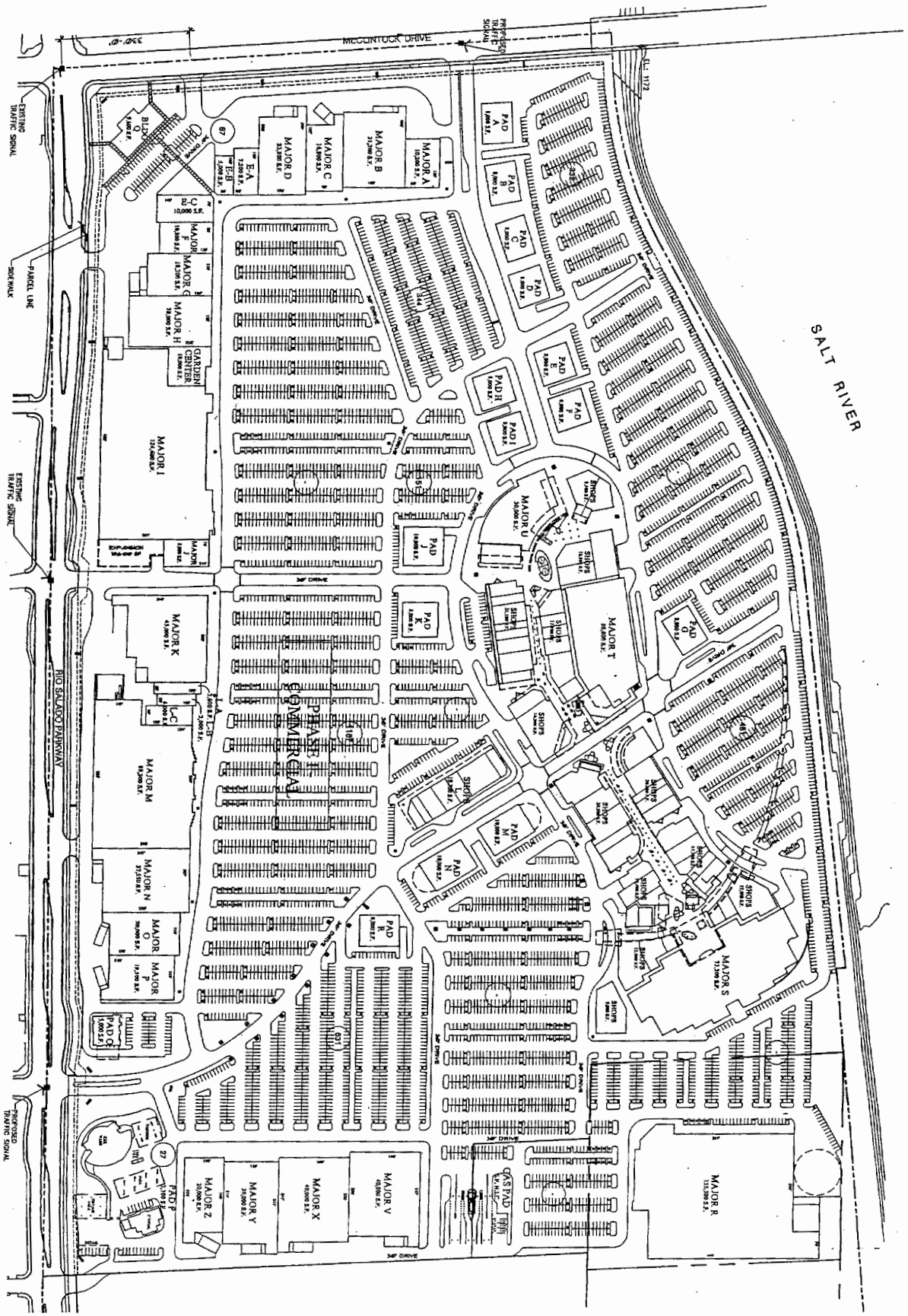


EXHIBIT H

Deed and Bill of Sale for Improvements

WHEN RECORDED, RETURN TO:

Marlene Pontrelli, Esq.
City Attorney
City of Tempe
140 East 5th Street
Tempe, Arizona 85244-4008

DEED AND BILL OF SALE FOR IMPROVEMENTS

FOR THE CONSIDERATION OF TEN AND NO/100 DOLLARS ($10.00) and other good and valuable consideration, the receipt and sufficiency of which are hereby expressly acknowledged, the undersigned, _____, a(n) _____ ("Grantor"), does hereby convey to the CITY OF TEMPE, an Arizona municipal corporation ("Grantee"), all improvements constructed for and by Grantor which are located on that certain real property described on Exhibit A which is incorporated herein by this reference. Subject to current taxes, assessments, reservations in patents and all easements, rights-of-way, encumbrances, liens, covenants, conditions and restrictions as may appear of record, the undersigned does hereby warrant the title to such improvements against all persons whomsoever.

DATED this ____ day of _____, 200__.

_____, a(n) _____

By: _____
Its: _____

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 20__ by _____, as _____ of _____, a(n) _____, for and on behalf of such _____.

_____
Notary Public

My Commission Expires:_____

EXHIBIT I

Terms subject to negotiation and approval of City Council

LAND AND IMPROVEMENTS LEASE

THIS LAND AND IMPROVEMENTS LEASE ("Lease") is made and entered into as of the _____day of _____, 2003 by and between the **CITY OF TEMPE**, a municipal corporation ("Landlord"), and **VESTAR ARIZONA XLV, LLC,** an Arizona limited liability company, ("Tenant").

RECITALS

A. Landlord has title of record to the land and building(s) which comprises the improvements constructed on land described in **Exhibit A** hereto (the "Land"), together with all rights and privileges appurtenant thereto and all future additions thereto or alterations thereof (collectively, the "Premises").

B. The Premises are located in a single central business district in a redevelopment area established pursuant to Title 36, Chapter 12, Article 3 of Arizona Revised Statutes (A.R.S. §§36-1471 et seq.). The construction of the Premises resulted in an increase in property value of at least one hundred percent.

C. The Premises will be subject to the Government Property Lease Excise Tax as provided for under ARS §42-6201 et.seq. (the "Tax"). By Resolution No._____, dated _____, Landlord abated the Tax for the period beginning upon the issuance of the certificate of occupancy for the Premises and ending eight years thereafter, all as provided in A.R.S. §42-6209 (A)). But for the abatement, Tenant would not have caused the Premises to be constructed.

AGREEMENT

For and in consideration of the rental and of the covenants and agreements hereinafter set forth to be kept and performed by Tenant, Landlord hereby leases to Tenant and Tenant hereby leases from Landlord the Premises for the term, at the rental and subject to and upon all of the terms, covenants and agreements hereinafter set forth.

1. **Quiet Enjoyment.**

Landlord covenants and agrees with Tenant that so long as this Lease is free from default (any required notice having been given and any applicable loan period having expired), Tenant may at all times during the term hereof peaceably, quietly and exclusively have, hold and enjoy the Premises.

2. **Term.**

The term of this Lease shall be for eight (8) years, commencing on the date of issuance of a final Certificate of Occupancy for the Premises (the "Commencement Date") and ending at midnight on the eighth (8th) anniversary of the Commencement Date, subject to earlier termination at Tenant's option, as provided herein.

3. **Rental.**

Tenant covenants to pay to Landlord as rental for the Premises the sum of fifty thousand dollars ($50,000) per year on the Commencement Date and every anniversary thereof. The consideration for this Lease includes, without limitation: Tenant's payment of the entire cost of construction of the improvements constituting the Premises, Tenant's performance of all of the covenants and obligations under this Lease and Tenant's contribution toward fulfillment of Landlord's policy and desire to promote development within a redevelopment area, to encourage the creation of jobs within the City of Tempe, and to enhance tax revenues resulting from the operation of businesses on the Premises, including transaction privilege taxes and the government property lease excise tax. Tenant, at its option and without prejudice to its right to terminate this Lease as provided herein, may prepay the rental for the entire lease term, but upon any early termination of this Lease, Landlord shall not be obligated to refund any portion of the prepaid rental.

4. **Leasehold Mortgage of Premises.**

(a) Subject to the applicable provisions of this Lease, Tenant is hereby given the absolute right without the Landlord's consent to create a security interest in Tenant's leasehold interest under this Lease (and in any subleases and the rents, income and profits therefrom) by mortgage, deed of trust or collateral assignment or otherwise. Any such security interest shall be referred to herein as a "Leasehold Mortgage," and the holder of a Leasehold Mortgage shall be referred to herein as a "Leasehold Mortgagee."

(b) No liability for the performance of Tenant's covenants and agreements hereunder shall attach to or be imposed upon any Leasehold Mortgagee, unless such Leasehold Mortgagee forecloses its interest and becomes the Tenant hereunder, following which the liability shall attach only during the term of ownership of the leasehold estate by said Leasehold Mortgagee.

5. **Taxes; Lease Obligations.**

(a) Payment. Tenant shall pay and discharge, prior to delinquency, all general and special real estate and/or personal property taxes and assessments levied or assessed against or with respect to the Premises during the term hereof and all charges, assessments or other fees payable with respect to or arising out of this Lease and all recorded deed restrictions affecting or relating to the Premises. Any sales, use, excise or transaction privilege tax consequence incurred by Landlord because of this Lease or in relation to the Premises or improvements included therein may be passed on to the Tenant either directly if applicable or as "additional rent."

(b) Protest. Tenant may, at its own cost and expense protest and contest, by legal proceedings or otherwise, the validity or amount of any such tax or assessment herein agreed to be paid by Tenant and shall first pay said tax or assessment under protest if legally required as a condition to such protest and contest, and the Tenant shall not in the event of and during the bona fide prosecution of such protest or proceedings be considered as in default with respect to the payment of such taxes or assessments in accordance with the terms of this Lease.

(c) Procedure. Landlord agrees that any proceedings contesting the amount or validity of taxes or assessments levied against the Premises or against the rentals payable hereunder may be filed or instituted in the name of Landlord or Tenant, as the case may require or permit, and the Landlord does hereby appoint the Tenant as its agent and attorney-in-fact, during the term of this Lease, to execute and deliver in the name of the Landlord any document, instrument or pleading as may be reasonably necessary or required in order to carry on any contest, protest or proceeding contemplated in this Section. Tenant shall hold the Landlord harmless from any liability, damage or expense incurred or suffered in connection with such proceedings.

(d) Allocation. All payments contemplated by this Section 5 shall be prorated for partial years at the Commencement Date and at the end of the Lease term.

6. Use.

Subject to the applicable provisions of this Lease and A.R.S. §42-6201(2), the Premises may be used and occupied by Tenant for any lawful purpose.

7. Landlord Non-Responsibility.

Landlord shall have no responsibility, obligation or liability under this Lease whatsoever with respect to any of the following:

(a) utilities, including gas, heat, water, light, power, telephone, sewage, and any other utilities supplied to the Premises;

(b) disruption in the supply of services or utilities to the Premises;

(c) maintenance, repair or restoration of the Premises;

(d) any other cost, expense, duty, obligation, service or function related to the Premises.

8. Entry by Landlord.

Landlord and Landlord's agents shall have the right at reasonable times and upon reasonable notice to enter upon the Premises for inspection, except that Landlord shall have no right to enter portions of any building on the Premises without consent of the occupant or as provided by law.

9. Alterations.

Subject to the applicable provisions of this Lease, Tenant shall have the right to construct additional improvements and to make subsequent alterations, additions or other changes to any improvements or fixtures existing from time to time, and the Premises shall constitute all such improvements as they exist from time to time. In connection with any action which Tenant may take with respect to Tenant's rights pursuant hereto, Landlord shall not be responsible for and Tenant shall pay all costs, expenses and liabilities arising out of or in any way connected with such improvements, alterations, additions or other changes made by Tenant, including without limitation materialmens' and mechanic's liens. Tenant covenants and agrees that Landlord shall not be called upon or be obligated to make any improvements, alterations or repairs whatsoever in or about the Premises, and Landlord shall not be liable or accountable for any damages to the Premises or any property located thereon. Tenant shall have the right at any time to demolish or substantially demolish improvements located upon the Premises. In making improvements and alterations, Tenant shall not be deemed Landlord's agent and shall hold Landlord harmless from any expense or damage Landlord may incur or suffer. Title to all improvements shall at all times be vested in Landlord.

10. Easements, Dedications and Other Matters.

At the request of Tenant, when not in default hereunder, Landlord shall dedicate or initiate a request for dedication to public use of the improvements (any required notice having been given and applicable cure period having expired) owned by Landlord within any roads, alleys or easements and convey any portion so dedicated to the appropriate governmental authority, execute (or participate in a request for initiation by the appropriate commission or department of) petitions seeking annexation or change in zoning for all or a portion of the Premises, consent to the making and recording, or either, of any map, plat, condominium documents, or declaration of covenants, conditions and restrictions of or relating to the Premises or any part thereof, join in granting any easements on the Premises, and execute and deliver (in recordable form where appropriate) all other instruments and perform all other acts reasonably necessary or appropriate to the development, construction, razing, redevelopment or reconstruction of the Premises.

11. Insurance.

During the term of this Lease, the Tenant shall, at Tenant's expense, maintain (or caused to be maintained) commercial general liability insurance against claims for personal injury, death or property damage occurring in, upon or about the Premises. The limitation of liability of such insurance during the first five years of the term shall not be less than $5,000,000.00 combined single limit. The minimum policy limits shall be increased as of the fifth anniversary of the Commencement Date to an amount equal to $5,000,000.00 multiplied by a fraction, the numerator of which is the Consumer Price Index--All Items--All Consumers--U.S. Cities Average--(1982 - 1984 = 100) published by the United States Department of Labor, Bureau of Labor Statistics (the "CPI") for the month three months prior to such fifth anniversary and the denominator of which is the CPI for _____, 200__. In the event the CPI is

discontinued or substantially modified, Tenant shall substitute such alternative price index, published by the United States Government or other generally accepted source for such information, reconciled to the Commencement Date. All of Tenant's policies of liability insurance shall name Landlord and all Leasehold Mortgagees as additional insureds, and, at the written request of Landlord, certificates with respect to all policies of insurance or copies thereof required to be carried by Tenant under this Section 11 shall be delivered to Landlord. Each policy shall contain an endorsement prohibiting cancellation or non-renewal without at least thirty (30) days prior notice to Landlord (ten (10) days for nonpayment). Tenant may self-insure the coverages required by this Section with the prior approval of Landlord, which will not be unreasonably withheld, and may maintain such reasonable deductibles and retention amounts as Tenant may determine.

12. Liability; Indemnity.

Tenant covenants and agrees that Landlord is to be free from liability and claim for damages by reason of any injury to any person or persons, including Tenant, or property of any kind whatsoever and to whomsoever while in, upon or in any way connected with the Premises during the term of this Lease or any extension hereof, or any occupancy hereunder. Tenant agrees to unconditionally indemnify, protect, defend and hold harmless the City, its Council members, officers, employees, and agents from any and all claims, demands, losses, damages, liabilities, fines, charges, penalties, administrative and judicial proceedings and orders, judgments, remedial actions of any kind, and all costs and cleanup actions of any kind, all costs and expenses incurred in connection therewith, including, without limitation, reasonable attorney's fees and costs of defense arising , directly or indirectly, in whole or in part, out of the execution of this Lease. The provisions of this Section shall survive the expiration or other termination of this Lease.

13. Fire and Other Casualty.

In the event that all or any improvements or fixtures within the Premises shall be totally or partially destroyed or damaged by fire or other insurable casualty, this Lease shall continue in full force and effect, and, subject to the applicable provisions of this Lease, Tenant, at Tenant's sole cost and expense, may, but shall not be obligated to, rebuild or repair the same. Landlord and Tenant agree that the provisions of A.R.S. § 33-343 shall not apply to this Lease. In the event that, subject to the applicable provisions of this Lease, Tenant elects to repair or rebuild the improvements, any such repair or rebuilding shall be performed at the sole cost and expense of Tenant. If there are insurance proceeds resulting from such damage or destruction, Tenant shall be entitled to such proceeds, whether or not Tenant rebuilds or repairs the improvements or fixtures, subject to the applicable provisions of this Lease.

14. Condemnation.

(a) Entire or Partial Condemnation. If the whole or any part of the Premises shall be taken or condemned by any competent authority for any public use or purposes during the term of the Lease, this Lease shall terminate with respect to the part of the Premises so taken,

and, subject to the applicable provisions of this Lease, Tenant reserves unto itself the right to claim and prosecute its claim in all appropriate courts and agencies for any award or damages based upon loss, damage or injury to its leasehold interest (as well as relocation and moving costs). In consideration of Tenant's payment for all of the cost of construction of the improvements constituting the Premises, Landlord hereby assigns to Tenant all claims, awards and entitlements relating to the Premises arising from the exercise of the power of condemnation or eminent domain.

(b) Continuation of Lease. In the event of a taking of less than all of the Premises, this Lease shall continue in effect with respect to the portion of the Premises not so taken.

(c) Temporary Taking. If the temporary use of the whole or any part of the Premises or the appurtenances thereto shall be taken, the term of this Lease shall not be reduced or affected in any way. The entire award of such taking (whether paid by way of damages, rent, or otherwise) shall be payable to Tenant, subject to the applicable provisions of this Lease and of any Leasehold Mortgage.

(d) Notice of Condemnation. In the event any action is filed to condemn the Premises or Tenant's leasehold estate or any part thereof by any public or quasi-public authority under the power of eminent domain or in the event that an action is filed to acquire the temporary use of the Premises or Tenant's leasehold estate or any part thereto, or in the event that action is threatened or any public or quasi-public authority communicates to Landlord or Tenant its desire to acquire the temporary use thereof, by a voluntary conveyance or transfer in lieu of condemnation, either Landlord or Tenant shall give prompt notice thereof to the other and to any Leasehold Mortgagee. Landlord, Tenant and each Leasehold Mortgagee shall each have the right, at its own cost and expense, to represent its respective interest in each proceeding, negotiation or settlement with respect to any taking or threatened taking. No agreement, settlement, conveyance or transfer to or with the condemning authority affecting Tenant's leasehold interest shall be made without the consent of Tenant and each Leasehold Mortgagee.

15. Termination Option.

(a) Grant of Option. In the event changes in applicable law nullify, remove, or vitiate the economic benefit to Tenant provided by this Lease or if any person or entity succeeds to Tenant's interest hereunder by foreclosure sale, trustee's sale, or deed in lieu of foreclosure (collectively, "Foreclosure"), Tenant or Tenant's successor by Foreclosure shall have the option, exercisable by written notice to Landlord, to terminate this Lease effective sixty days after the date of the notice. Upon default under the Leasehold Mortgage, Tenant or Leasehold Mortgagee shall have the option, exercisable by written notice to Landlord, to terminate this Lease effective sixty days after the date of the notice. Simultaneously with, and effective as of such termination, title to the Premises (including all improvements constituting a part thereof) shall automatically vest in Tenant and Landlord shall comply with the obligations under Article 20.

(b) Leasehold Mortgagees and Tenant. If there are any Leasehold Mortgagees as defined in Section 4(a), Tenant may not terminate, modify or waive its Option under this section without the approval of the Leasehold Mortgagees, and Landlord will not recognize or consent thereto without such approval.

16. Assignment; Subletting.

(a) Transfer by Tenant; At any time and from time to time Tenant shall have the right to assign the Lease and Tenant's leasehold interest or to sublease all of or any part of the Premises to any person or persons on terms and conditions acceptable to Lessee in its sole and absolute discretion without the consent of the Landlord.

(b) Liability. Each assignee hereby assumes all of the obligations of the Tenant under the Lease (but not for liabilities or obligations arising prior to such assignment becoming effective). Each assignment shall automatically release the assignor from any personal liability in respect of any obligations or liabilities arising under the Lease from and after the date of assignment, and Landlord shall not seek recourse for any such liability against any assignor or its personal assets. Landlord agrees that performance by a subtenant or assignee of Tenant's obligations under this Lease shall satisfy Tenant's obligations hereunder and Landlord shall accept performance by any such subtenant.

17. Default Remedies; Protection of Leasehold Mortgagee and Subtenants.

(a) Default. The failure by Tenant to observe and perform any material provision of this Lease to be observed or performed by Tenant or a failure to pay the Tax when due, where such failure continues for one hundred eighty days after written notice thereof by Landlord to Tenant shall constitute a default and breach of this Lease by Tenant; provided, however, that if the nature of such default is such that the same cannot reasonably be cured within such one hundred eighty day period, Tenant shall not be deemed to be in default if Tenant shall within such period commence such cure and thereafter diligently prosecute the same to completion.

(b) Remedies. In the event of any such material default or breach by Tenant, Landlord may at any time thereafter, by written notice to Tenant terminate this Lease, in which case Tenant shall immediately surrender possession of the Premises to Landlord. This section constitutes the provision required under A.R.S. §42-6206(2) that failure by the prime lessee to pay the Tax after notice and an opportunity to cure is an event of default that could result in divesting the prime lessee of any interest or right or occupancy of the government property improvement.

(c) Leasehold Mortgagee Default Protections. If any Leasehold Mortgagee shall give written notice to Landlord of its Leasehold Mortgage, together with the name and address of the Leasehold Mortgagee, then, notwithstanding anything to the contrary in this Lease, until the time, if any, that the Leasehold Mortgage shall be satisfied and released of record

or the Leasehold Mortgagee shall give to Landlord written notice that said Leasehold Mortgage has been satisfied:

(i) No act or agreement between or on the part of Landlord or Tenant to cancel, terminate, surrender, amend, or modify this Lease or Tenant's right to possession shall be binding upon or effective as against the Leasehold Mortgagee without its prior written consent.

(ii) If Landlord shall give any notice, demand, election or other communication required hereunder (hereafter collectively "Notices") to Tenant hereunder, Landlord shall concurrently give a copy of each such Notice to the Leasehold Mortgagee at the address designated by the Leasehold Mortgagee. Such copies of Notices shall be sent by registered or certified mail, return receipt requested, and shall be deemed given seventy-two hours after the time such copy is deposited in a United States Post Office with postage charges prepaid, addressed to the Leasehold Mortgagee. No Notice given by Landlord to Tenant shall be binding upon or affect Tenant or the Leasehold Mortgagee unless a copy of the Notice shall be given to the Leasehold Mortgagee pursuant to this subsection. In the case of an assignment of the Leasehold Mortgage or change in address of the Leasehold Mortgagee, the assignee or Leasehold Mortgagee, by written notice to Landlord, may change the address to which such copies of Notices are to be sent.

(iii) The Leasehold Mortgagee shall have the right for a period of sixty days after the expiration of any grace period afforded Tenant to perform any term, covenant, or condition and to remedy any default by Tenant hereunder or such longer period as the Leasehold Mortgagee may reasonably require to affect a cure, and Landlord shall accept such performance with the same force and effect as if furnished by Tenant, and the Leasehold Mortgagee shall thereby and hereby be subrogated to the rights of Landlord. The Leasehold Mortgagee shall have the right to enter upon the Premises to give such performance.

(iv) In case of a default by Tenant in the performance or observance of any nonmonetary term, covenant or condition to be performed by it hereunder, if such default cannot practicably by cured by the Leasehold Mortgagee without taking possession of the Premises, in such Leasehold Mortgagee's reasonable opinion, or if such default is not susceptible of being cured by the Leasehold Mortgagee, then Landlord shall not serve a notice of lease termination pursuant to Section 17((b)), if and so long as:

(1) the Leasehold Mortgagee shall proceed diligently to obtain possession of the Premises as mortgagee (including possession by a receiver), and, upon obtaining such possession, shall proceed diligently to cure such defaults as are reasonably susceptible of cure (subject to any order by a court of competent jurisdiction staying or otherwise precluding such Leasehold Mortgagee from obtaining such possession); or

(2) the Leasehold Mortgagee shall institute foreclosure proceedings and diligently prosecute the same to completion (unless in the meantime it shall acquire Tenant's estate hereunder, either in its own name or through a nominee, by assignment in lieu of foreclosure and subject to any order by a court of competent jurisdiction staying or otherwise precluding such Leasehold Mortgagee from obtaining such possession).

The Leasehold Mortgagee shall not be required to obtain possession or to continue in possession as mortgagee of the Premises pursuant to Clause (1) above, or to continue to prosecute foreclosure proceedings pursuant to Clause (2) above, if and when such default shall be cured. If a Leasehold Mortgagee, its nominee, or a purchaser at a foreclosure sale shall acquire title to Tenant's leasehold estate hereunder, a default that is not reasonably susceptible to cure by the person succeeding to the leasehold interest shall no longer be deemed a default hereunder.

(v) If any Leasehold Mortgagee is prohibited from commencing or prosecuting foreclosure or other appropriate proceedings in the nature thereof by any process or injunction issued by any court or by reason of any action by any court having jurisdiction of any bankruptcy or insolvency proceeding involving Tenant, the times specified in subparagraphs (iv) (1) and (2) above, for commencing or prosecuting foreclosure or other proceedings shall be extended for the period of the prohibition.

(vi) No option of Tenant hereunder may be exercised, and no consent of Tenant allowed or required hereunder shall be effective without the prior written consent of any Leasehold Mortgagee.

(d) Protection of Subtenant. Landlord covenants that notwithstanding any default under or termination of this Lease or of Tenant's possessory rights, Landlord: (i) so long as a subtenant within the Premises complies with the terms and conditions of its sublease, shall not disturb the peaceful possession of the subtenant under its sublease, and in the event of a default by a subtenant, Landlord may only disturb the possession or other rights of the subtenant as provided in the subtenant's sublease, (ii) shall recognize the continued existence of the sublease, (iii) shall accept the subtenant's attornment, as subtenant under the sublease, to Landlord, as landlord under the sublease, and (iv) shall be bound by the provisions of the sublease, including all options. Notwithstanding anything to the contrary in this Lease, no act or agreement between or on the part of Landlord or Tenant to cancel, terminate, surrender or modify this Lease or Tenant's right to possession shall be binding upon or effective as against any subtenant without its prior written consent. The provisions of this Section 17(d) are intended to be self operative and no further agreement shall be required to implement the foregoing non-disturbance and recognition provisions.

18. New Lease.

(a) Right to Lease. Landlord agrees that, in the event of termination of this Lease for any reason (including but not limited to any default by Tenant or a rejection of this

Lease in Bankruptcy by Tenant), Landlord, if requested by any Leasehold Mortgagee, will enter into a new lease of the Premises with the most senior Leasehold Mortgagee requesting a new lease, which new lease shall commence as of the date of termination of this Lease and shall run for the remainder of the original term of this Lease, at the rent and upon the terms, covenants and conditions herein contained, provided:

(i) Such Leasehold Mortgagee shall make written request upon Landlord for the new lease within sixty days after the date such Leasehold Mortgagee receives written notice from Landlord that the Lease has been terminated;

(ii) Such Leasehold Mortgagee shall pay to Landlord at the time of the execution and delivery of the new lease any and all sums which would, at that time, be due and unpaid pursuant to this Lease but for its termination, and in addition thereto all reasonable expenses, including reasonable attorneys fees, which Landlord shall have incurred by reason of such termination;

(iii) Such Leasehold Mortgagee shall perform and observe all covenants in this Lease to be performed and observed by Tenant, and shall further remedy any other conditions which Tenant under the Lease was obligated to perform under its terms, to the extent the same are reasonably susceptible of being cured by the Leasehold Mortgagee; and

(iv) The Tenant under the new lease shall have the same right of occupancy to the buildings and improvements on the Premises as Tenant had under the Lease immediately prior to its termination.

Notwithstanding anything to the contrary expressed or implied in this Lease, any new lease made pursuant to this Section 18 shall have the same priority as this Lease with respect to any mortgage, deed of trust, or other lien, charge, or encumbrance on the fee of the Premises, and any sublease under this Lease shall be a sublease under the new Lease and shall not be deemed to have been terminated by their termination of this Lease.

(b) No Obligation. Nothing herein contained shall require any Leasehold Mortgagee to enter into a new lease pursuant to this Section 18 or to cure any default of Tenant referred to above.

(c) Possession. If any Leasehold Mortgagee shall demand a new lease as provided in this Section 18, Landlord agrees, at the request of, on behalf of and at the expense of the Leasehold Mortgagee, upon a guaranty from it reasonably satisfactory to Landlord, to institute and pursue diligently to conclusion the appropriate legal remedy or remedies to oust or remove the original Tenant from the Premises, but not any subtenants actually occupying the Premises or any part thereof.

(d) Grace Period. Unless and until Landlord has received notice from each Leasehold Mortgagee that the Leasehold Mortgagee elects not to demand a new lease as provided in this Section 18, or until the period therefor has expired, Landlord shall not cancel or

agree to the termination or surrender of any existing subleases nor enter into any new leases or subleases with respect to the Premises without the prior written consent of each Leasehold Mortgagee.

(e) Effect of Transfer. Neither the foreclosure of any Leasehold Mortgage (whether by judicial proceedings or by virtue of any power of sale contained in the Leasehold Mortgage), nor any conveyance of the leasehold estate created by this Lease by Tenant to any Leasehold Mortgagee or its designee by an assignment or by a deed in lieu of foreclosure or other similar instrument shall require the consent of Landlord under, or constitute a default under, this Lease, and upon such foreclosure, sale or conveyance, Landlord shall recognize the purchaser or other transferee in connection therewith as the Tenant under this Lease.

19. No Merger.

In no event shall the leasehold interest, estate or rights of Tenant hereunder, or of any Leasehold Mortgagee, merge with any interest, estate or rights of Landlord in or to the premises. Such leasehold interest, estate and rights of Tenant hereunder, and of any Leasehold Mortgagee, shall be deemed to be separate and distinct from Landlord's interest, estate and rights in or to the Premises, notwithstanding that any such interests, estates or rights shall at any time be held by or vested in the same person, corporation or other entity.

20. Surrender, Reconveyance.

(a) Reconveyance Upon Termination or Expiration. On the last day of the term of this Lease or upon any termination of this Lease, whether under Article 15 above or otherwise, title to the Premises (including all improvements constituting a part thereof) shall automatically vest in Tenant.

(b) Reconveyance Documents. Without limiting the foregoing, Landlord upon request shall execute and deliver: (i) a deed or bill of sale reconveying all of Landlord's right title and interest in the land and improvements to Tenant; (ii) a memorandum in recordable form reflecting the termination of this Lease; (iii) an assignment of Landlord's right, title and interest in and to all licenses, permits, guaranties and warranties relating to the ownership or operation of the Premises to which Landlord is a party and which are assignable by Landlord, and (iv) such other reasonable and customary documents as may be required by Tenant or its title insurer including, without limitation, FIRPTA and mechanic's lien affidavits, to confirm the termination of this Lease and the revesting of title to the Premises in Tenant.

(c) Title and Warranties. Notwithstanding anything to the contrary in this section, Landlord shall convey the Premises subject only to: (i) matters affecting title as of the date of this Lease, and (ii) matters created by or with the consent of Tenant. The Premises shall be conveyed "AS IS" without representation or warranty whatsoever. Upon any reconveyance, Landlord shall satisfy all liens and monetary encumbrances on the Premises created by Landlord.

(d) Expenses. All costs of title insurance, escrow fees, recording fees and other expenses of the reconveyance, except Landlord's own attorneys' fees and any commissions payable to any broker retained by Landlord, shall be paid by Tenant.

21. Trade Fixtures, Machinery and Equipment.

Landlord agrees that all trade fixtures, machinery, equipment, furniture or other personal property of whatever kind and nature kept or installed on the Premises by Tenant or Tenant's subtenants may be removed by Tenant or Tenant's subtenants, or their agents and employees, in their discretion, at any time and from time to time during the entire term or upon the expiration of this Lease. Tenant agrees that in the event of damage to the Premises due to such removal it will reasonably repair or restore the same. For the benefit of any vendor, equipment lessor, chattel mortgagees or holders or owners of any trade fixtures, machinery, equipment, furniture or other personal property of any kind and description kept or installed on the Premises by any subtenant, Landlord hereby waives, in favor of such vendor, equipment lessor, chattel mortgagee or any holder or owner, any lien, claim, interest or other right therein superior to that of such vendor, equipment lessor, chattel mortgagee, owner or holder. Landlord further acknowledges that property covered by the foregoing waiver is personal property and is not to become a part of the realty no matter how affixed thereto and that such property may be removed from the Premises by the vendor, equipment lessor, chattel mortgagee, owner or holder at any time upon default by the Tenant or the subtenant in the terms of such chattel mortgage or other similar documents, free and clear of any claim or lien of Landlord.

22. Estoppel Certificate.

(a) Landlord shall at any time and from time to time upon not less then ten (10) days' prior written notice from Tenant or any Leasehold Mortgagee, without charge, execute, acknowledge and deliver to Tenant or the Leasehold Mortgagee a statement in writing (i) certifying that this Lease is unmodified and in full force and effect (or if modified, stating the nature of such modification and certifying that this Lease, as so modified, is in full force and effect) and the dates to which the rental and other charges are paid in advance, if any; (ii) acknowledging that there are not, to Landlord's knowledge, any uncured defaults on the part of Tenant hereunder, or specifying such defaults if they are claimed; and (iii) certifying such other matters relating to this Lease as Tenant or the Leasehold Mortgagee may reasonably request. Any such statement may be relied upon by any prospective purchaser or encumbrancer of all or any portion of the leasehold estate and/or the improvements.

(b) Landlord's failure to deliver a statement within the time prescribed shall be conclusive upon Landlord (i) that this Lease is in full force and effect, without modification except as may be represented by Tenant; and (ii) that there are no uncured defaults in Tenant's performance.

23. General Provisions.

(a) Attorneys' Fees. In the event of any suit instituted by either party against the other in any way connected with this Lease or for the recovery of possession of the Premises, the parties respectively agree that the successful party to any such action shall recover from the other party a reasonable sum for its attorneys' fees and costs in connection with said suit, such attorneys' fees and costs to be fixed by the court.

(b) Transfer or Encumbrance of Landlord's Interest. Landlord may not transfer or convey its interest in this Lease or in the Premises during the term of this Lease without the prior written consent of Tenant, which consent may be given or withheld in Tenant's sole and absolute discretion. In the event of permitted sale or conveyance by Landlord of Landlord's interest in the Premises, other than a transfer for security purposes only, Landlord shall be relieved, from and after the date specified in such notice of transfer, of all obligations and liabilities accruing thereafter on the part of the Landlord, provided that any funds in the hands of Landlord at the time of transfer in which Tenant has an interest, shall be delivered to the successor of Landlord. This Lease shall not be affected by any such sale and Tenant agrees to attorn to the purchaser or assignee provided all of Landlord's obligations hereunder are assumed in writing by the transferee. Landlord shall not grant or create mortgages, deeds of trust or other encumbrances of any kind against the Premises or rights of Landlord hereunder, and, without limiting the generality of the foregoing, Landlord shall have no right or power to grant or create mortgages, deeds of trust or other encumbrances superior to this Lease without the consent of Tenant in its sole and absolute discretion. Any mortgage, deed of trust or other encumbrance granted or created by Landlord shall be subject to this Lease, all subleases and all their respective provisions including, without limitation, the options under this Lease, the sublease recognition and non-disturbance provisions for subleases and provisions with respect to the purchase of the Premises.

(c) Captions; Attachments; Defined Terms.

(i) The captions of the sections of the Lease are for convenience only and shall not be deemed to be relevant in resolving any question of interpretation or construction of any section of this Lease.

(ii) Exhibits attached hereto, and addendums and schedules initialed by the parties, are deemed by attachment to constitute part of this Lease and are incorporated herein.

(iii) The words "Landlord" and "Tenant", as used herein, shall include the plural as well as the singular. The obligations contained in this Lease to be performed by Tenant and Landlord shall be binding on Tenant's and Landlord's successors and assigns only during their respective periods of ownership.

(d) Entire Agreement. This Lease along with any addenda, exhibits and attachments hereto constitutes the entire agreement between Landlord and Tenant relative to the

Premises and this Lease and the addenda, exhibits and attachments may be altered, amended or revoked only by an instrument in writing signed by the party to be bound thereby. Landlord and Tenant agree hereby that all prior or contemporaneous oral agreements between and among themselves and their agents or representatives relative to the leasing of the Premises are merged in or revoked by this Lease, except as set forth in any addenda hereto.

(e) Severability. If any term or provision of this Lease shall, to any extent, be determined by a court of competent jurisdiction to be invalid or unenforceable, the remainder of this Lease shall not be affected thereby, and each term and provision of this Lease shall be valid and be enforceable to the fullest extent permitted by law, unless the material intent of this lease is vitiated by such severance.

(f) Binding Effect; Choice of Law. The parties hereto agree that all the provisions hereof are to be construed as both covenants and conditions as though the words importing such covenants and conditions were used in each separate paragraph hereof. All of the provisions hereof shall bind and inure to the benefit of the parties hereto and their respective heirs, legal representatives, successors and assigns. This Lease shall be governed by the laws of the State of Arizona.

(g) Memorandum of Land and Improvements Lease. The parties shall, concurrently with the execution of this Lease, complete, execute, acknowledge and record (at Tenant's expense) a Memorandum of Land and Improvements lease, a form of which is attached hereto as Exhibit B

(h) Notices. All notices, requests, demands and other communications hereunder shall be in writing and shall be deemed to have been duly given if personally delivered or if mailed by United States certified or registered mail, return receipt requested, postage prepaid, as follows:

If to Landlord:

City of Tempe
City Manager' s Office
31 E; 5th Street
Tempe, Arizona 85281

With a copy to:

City of Tempe
City Attorney's Office
31 East 5th Street
Tempe, Arizona 85281

If to Tenant:

Vestar Arizona XLV, LLC
c/o Vestar Development Co.
2425 East Camelback Road, Suite 750
Phoenix, Arizona 85016
Attention: David J. Larcher

With a copy to:

David L. Lansky
c/o Mariscal, Weeks, McIntyre & Friedlander
2901 North Central Avenue
Suite 200
Phoenix, Arizona 85012

or at such other place or to such other persons as any party shall from time to time notify the other in writing as provided herein. The date of service of any communication hereunder shall be the date of personal delivery or seventy-two hours after the postmark on the certified or registered mail, as the case may be.

(i) Waiver. No covenant, term or condition or the breach thereof shall be deemed waived, except by written consent of the party against whom the waiver is claimed, and any waiver or the breach of any covenant, term or condition shall not be deemed to be a waiver of any preceding or succeeding breach of the same or any other covenant, term or condition.

(j) Negation of Partnership. Landlord shall not become or be deemed a partner or a joint venturer with Tenant by reason of the provisions of this Lease.

(k) Hold Over. If Tenant shall continue to occupy the Leased Premises after the expiration of the term hereof without the consent of Landlord, such tenancy shall be from month to month on the same terms and conditions as are set forth herein.

(l) Leasehold Mortgagee Further Assurances. Landlord and Tenant shall cooperate in including in this Lease by suitable amendment from time to time any provision which may be reasonably requested by any proposed Leasehold Mortgagee for the purpose of implementing the mortgagee-protection provisions contained in this Lease, of allowing that Leasehold Mortgagee reasonable means to protect or preserve the lien of its Leasehold Mortgage upon the occurrence of a default under the terms of this Lease and of confirming the elimination of the ability of Tenant to modify, terminate or waive this Lease or any of its provisions without the prior written approval of the Leasehold Mortgagee. Landlord and Tenant each agree to execute and deliver (and to acknowledge, if necessary, for recording purposes) any agreement necessary to effect any such amendment; provided, however, that any such amendment shall not in any way affect the term or rent under this Lease nor otherwise in any material respect adversely affect any rights of Landlord under this Lease.

IN WITNESS WHEREOF, the parties hereto have executed this Lease on the date and year first written above.

ATTEST:

By:_____
City Clerk

APPROVED AS TO FORM:

_____
City Attorney

LANDLORD:

CITY OF TEMPE, a municipal corporation

By:_____
Name:_____
Title:_____

TENANT:

VESTAR ARIZONA XLV, LLC, an Arizona limited liability company

By: _____
Name:_____
Title: _____

Exhibit A

Property Description

EXHIBIT B

Memorandum of Improvement Lease

WHEN RECORDED, RETURN TO:

MEMORANDUM OF IMPROVEMENTS LEASE

THIS MEMORANDUM OF IMPROVEMENTS LEASE (the "Memorandum") is made and entered into this _____ day of _____, 200__ by and between THE CITY OF TEMPE, an Arizona municipal corporation ("Landlord"), and VESTAR ARIZONA XLV, LLC an Arizona limited liability company ("Tenant"). Landlord and Tenant are sometimes referred to in this Agreement collectively as the "Parties", or individually as a "Party". The Parties hereby agree as follows:

1. The Parties have entered into and executed that certain Improvements Lease of even date with this Memorandum (the "Lease") whereby Landlord has leased to Tenant, and Tenant has leased from Landlord, that certain real property described in Exhibit A (the "Land"), together with all rights and privileges appurtenant to, and all present and future improvements on, the Land (collectively the "Premises"), for a _____ (____) year term commencing on _____, 20__ and ending at midnight on _____, 20__. The Lease sets forth all terms and provisions relative to the lease of the Premises by Landlord to Tenant. Without limiting the generality of the foregoing, Tenant has the right and option under Section 15 of the Lease to purchase the Premises at any time during the term of the Lease following _____, 20__ for a purchase price described in said Section. Further, Tenant has the right to mortgage its leasehold interest as described in Section 4 of the Lease and there are restrictions on the right of Landlord to transfer or encumber its interest in the Premises or the Lease as described in Section 23 of the Lease.

2. The Parties consider the Lease to be a binding agreement between them creating vested rights in and for Tenant superior to the right, title and interest of any third party later acquiring any interest in the Premises, including but not limited to purchasers of the Premises or lienholders acquiring any lien or encumbrance interest against the Premises. Further, the purchase option rights of Tenant are prior and superior to the right, tile and interest of any third party and enable and entitle Tenant to acquire title to the Premises free and clear of the liens or encumbrances of any other third party. All persons dealing with the Premises are advised to

contact Tenant and Landlord to ascertain the current status of the Lease and Tenant's tenancy rights and leasehold interests in the Premises. The Parties are executing and recording this Memorandum, as authorized by the Lease, to provide constructive notice to all persons dealing with the Premises of the binding end vested rights of Tenant and the leasehold interests of Tenant created by the Lease.

IN WITNESS WHEREOF, the Parties have executed this Memorandum to be effective on the date first written above.

VESTAR ARIZONA XLV, LLC an
Arizona limited liability company

By: _____
Its: _____

CITY OF TEMPE, an
Arizona municipal corporation

By: _____
Its: _____

ATTEST:

By: _____
City Clerk

APPROVED AS TO FORM:

By: _____
City Clerk

STATE OF ARIZONA)

) ss.

County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 20__ by _____, the _____ of _____, a(n) _____, for and on behalf of such _____.

_____

Notary Public

My Commission Expires:

_____

STATE OF ARIZONA)

) ss.

County of Maricopa)

The foregoing instrument was acknowledged before me this _____ day of _____, 20__ by _____, the _____ of The City of Tempe, an Arizona municipal corporation, for and on behalf of such corporation.

_____

Notary Public

My Commission Expires:

_____

EXHIBIT J
Reimbursement Amount

For purposes of calculating the sales tax reimbursement under this Agreement, the Retail Project shall be deemed to be divided into two phases (i.e., Phase 1 and Phase 1-A). The amount of sales tax reimbursement under this Agreement (the "Reimbursement Amount") payable to Builder shall be calculated as follows for such phases. Phase 1 shall comprise the initial 1,000,000 square feet of gross leasable area developed pursuant to the Final PAD. The Reimbursement Amount for Phase 1 payable to Builder shall be $23,300,000. Such amount shall bear interest at the rate of 8.5% per annum (compounded semi-annually) from the date building permits are issued for at least 750,000 square feet of gross leasable area. The Reimbursement Amount for Phase 1-A payable to Builder shall be $100,000 for each 10,000 square feet of gross leasable area for which Certificates of Completion or certificates of occupancy are issued above 1,000,000 gross leasable square feet, but in no event in excess of 340,000 additional square feet for a total additional Reimbursement Amount of $3,400,000 for Phase 1-A. The Reimbursement Amount for Phase 1-A shall bear interest for each such $100,000 increment at the rate of 8.5% (compounded semi-annually) from the date of the issuance of building permits for the applicable increments of 10,000 square feet above 1,000,000 gross leasable square feet of prior building permits. The Reimbursement Amounts set forth above are separate from, and in addition to, any other economic benefit or Incentives under this Agreement. The Reimbursement Amounts set forth above are also in addition to any payments made pursuant to the first item described in **Section 8.2.3.1** (i.e., Section 108 periodic loan payments).

EXHIBIT K

City Immediate Possession Deed

When recorded, return to:

Marlene Pontrelli, Esq.
City Attorney
City of Tempe
140 East 5th Street
Tempe, Arizona 85244-4008

Escrow No.

SPECIAL WARRANTY DEED

Pursuant to the terms of that certain City of Tempe Marketplace Development Parcel Agreement: Parcel No. 1 (Loop 101 and Loop 202) (the "Parcel No. 1 Agreement") and, in particular, Section 5.8.2 thereof, THE CITY OF TEMPE, an Arizona municipal corporation ("Grantor"), grants, conveys and assigns to _____, a[n] _____ ("Grantee"), Grantor's rights of possession and use of the following described real property:

See Exhibit A attached to and incorporated in this Special Warranty Deed by this reference (the "Property")

as set forth in the Order for Immediate Possession attached as Exhibit "B" hereto and incorporated herein.

Grantor hereby binds itself and its successors to warrant and defend the right conveyed herein, as against all acts of the Grantor and no other.

Dated to be effective as of _____, 200__.

GRANTOR:

THE CITY OF TEMPE,
an Arizona municipal corporation

By: _____
Its: _____

EXHIBIT L

Consent of Master Developer

City of Tempe
31 E. Fifth St.
Tempe, Arizona 85281
Attention: City Manager
Facsimile: 480-350-8996

Miravista/Vestar TM-Landco, L.L.C.
2425 E. Camelback Rd., Suite 750
Phoenix, Arizona 85016
Attention: David J. Larcher
Facsimile: 602-955-2298

RE: Tempe Marketplace
Consent to Development Parcel Agreement

Pursuant to paragraph 10.18 of the City of Tempe Marketplace Development Parcel Agreement ("Development Parcel Agreement") dated the _____ day of _____, 2004 entered into between the City of Tempe and Miravista/Vestar TM-Landco, L.L.C., Master Developer, pursuant to the Master Redevelopment Agreement described in Recital F of the Development Parcel Agreement, hereby consents to the Development Parcel Agreement. This consent is intended to satisfy the consent requirement set forth in Section 10.18 of the Development Parcel Agreement.

MIRAVISTA HOLDINGS, L.L.C.,
an Arizona limited liability company

By: _____
Bradley D. Wilde, Manager